Supreme Court, U.S.
FILED

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

No. _____

JOHN WINTERS, SR., Individually And As Representative Of The Estate of Margaret Winters, Deceased; Fr. Martin Winters and Charles Winters

Petitioners

v.

DIAMOND SHAMROCK CHEMICAL COMPANY; MONSANTO COMPANY; UNIROYAL INCORPORATED; HERCULES INC.; THOMPSON-HAYWARD CHEMICAL COMPANY, also known as Thompson Chemical Corporation; T H AGRICULTURE & NUTRITION COMPANY, INC.

Respondents

APPENDICES

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

MARGARET WINTERS,	§	
	§	
Plaintiff	§	
	§	
vs.	§	**NO. 1:93-CV-164**
	§	
DIAMOND SHAMROCK	§	
CHEMICAL COMPANY, ET AL.,	§	
	§	
Defendants.	§	
	§	
	§	

MEMORANDUM OPINION

Plaintiff Margaret Winters was a civilian employee who lived and worked in Vietnam. She alleges exposure to the herbicide "Agent Orange" that contained a harmful chemical compound called "dioxin."[1] Winters claims that these defendant chemical companies directly or indirectly caused this chemical to be used in Vietnam and, as a result, she suffered serious injury due to her exposure to the dioxin.[2]

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[1] Agent Orange is a blend of equal parts of 2,4-Dichlorophenoxyacetic Acid (2,4-D) and 2,4,5- Trichlorophenoxyacetic Acid (2,4,5-T). Depending on the method of production, this substance may contain varying amounts of 2,3,7,8 Tetrachlorodibenzo-p-dioxin, which is an extremely toxic substance. Hercules, Inc. v. United States, 25 Cl. Ct. 616, 628 (1992), aff'd, Hercules, Inc. v. United States, 24 F.3d 188 (Fed. Cir. 1994), cert. granted, 115 S. Ct. (1995).

[2] For a historical sketch of the use of Agent Orange in Vietnam and the ensuing litigation see Hercules, 24 F.3d 188, and cases cited therein.

Plaintiff originally filed this case in the 60th Judicial District Court in Jefferson County, Texas. Defendants removed the action pursuant to the Federal Officer removal statute, 28 U.S.C. section 1442(a)(1), and this court's original jurisdiction grounded on the federal common law governing military procurement, 28 U.S.C. section 1331. The Judicial Panel on Multidistrict Litigation found common questions of fact to exist with actions previously decided by the Eastern District of New York and transferred the case to Judge Jack B. Weinstein for disposition.

In the meantime, plaintiff filed a motion to remand contending that defendants are collaterally estopped from raising the same issues previously decided by Ryan v. Dow Chemical Co., 781 F Supp. 934 (E.D.N.Y. 1992), aff'd on other grounds, 996 F.2d 1425 (2d Cir. 1993), cert. denied, 114 S. Ct. 1125 (1994). In the alternative, plaintiff maintains that 28 U.S.C. section 1442(a)(1) does not warrant removal of this case. Judge Weinstein chose to abstain from ruling on plaintiff's motion to remand after holding a hearing on the motion. Instead, Judge Weinstein transferred the case back to this court pursuant to 28 U.S.C. section 1404(a) on the grounds that a Texas court could better handle the complex issues of Texas conflicts rules and substantive law applicable to the present case.

With the wheels of justice having ground an excruciatingly slow 360 degrees, this court is again faced with the proper disposition of this action. Plaintiff reurges her Motion to Remand on the same grounds stated above. Finding that special circumstances exist to preclude an application of offensive collateral estoppel in this case, and finding the right of removal under 28 U.S.C. section 1442(a)(1) to be absolute when, as in this case, defendants present a colorable defense arising out of their duty or actions required by federal law, the plaintiff's Motion to Remand is DENIED.

ANALYSIS

A defendant bears the burden of establishing federal jurisdiction over a suit initiated in state court. Carpenter v. Wichita Falls Indep. School Dist., 44 F.3d 362, 365 (5th Cir. 1995) (citing Wilson v. Republic Iron & Steel Co., 257 U.S. 92, 42 S. Ct. 35, 66 L.Ed. 144 (1921)). Defendants first seek to invoke this court's jurisdiction based on the absolute right of removal afforded to persons acting under color of federal officers or agencies. 28 U.S.C. Section 1442(a)(1). This statute, known as the Federal Officer Removal Statute, was enacted to permit federal officials, and those persons acting under them, to enjoy the sanctity of federal court jurisdiction. To successfully remove a case under section 1442(a)(1), a defendant must show that (1) they are "persons" within the meaning of the statute; (2) they must have been "acting under color of federal authority"

when committing the acts leading to the instant lawsuit; (3) they must assert a colorable federal defense. Guillory v. Ree's Contract Service, Inc., 872 F. Supp. 344, 346 (S.D. Miss. 1994) (citing Akin v. Big Three Indus., Inc., 851 F. Supp 819, 822 (E.D. Tex.1994); Pack v. AC and S, Inc., 838 F. Supp. 1099, 1101 (D. Md. 1993); Fung v. Abex Corp., 816 F. Supp. 569, 571-572 (N.D. Cal. 1992)).

This court finds that defendants are considered "persons" for purposes of this statute. The Fifth Circuit has, at least implicitly recognized that section 1442(a)(1) applies to corporate defendants. See Guillory, 872 F. Supp. at 346 n.3; and see Akin, 851 F. Supp. at 822. In cases where a corporation may be engaged in activities that may implement a federal policy or directive, "person" should be given a broad meaning to include companies that have acted under federal direction or authority.[3] Therefore, defendants meet the first criteria of being considered "persons" under the meaning of 1442(a)(1).

Defendants maintain that they also meet the remaining two criteria based on their actions taken under express federal direction and their claims of the federal defense of immunity under the Defense Production Act, 50 U.S.C. App. Sect. 2061 et seq., and the federal common law government contractor defense. Defendants assert that these defenses are

[3] For a more complete analysis of "person" as defined by section 1442(a)(1) see Ryan, 781 F. Supp. at 946-950.

sufficient to invoke this court's jurisdiction under 28 U.S.C. section 1442(a)(1). 28 U.S.C. section 1442(a)(1) provides:

> (a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

This statute has a long jurisprudential history.[4] For over 100 years, the Supreme Court has recognized that the Federal Government

> can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court, for an alleged offense the law of the State, yet warranted by the Federal authority they possess, and if the general government is powerless to interfere at once for their protection, -- if their protection must be left to the action of the State court, -- the operations of the general government may at any time be arrested at the will of one of its members.

Willingham, 395 U.S. at 406 (quoting Tennessee v. Davis, 100 U.S. 257, 263 (1880)); and see Primate Protection League v. Tulane Ed. Fund, 500 U.S. 72, 85-87 (1991); Mesa v. California, 489 U.S. 121, 125-134 (1989). Willingham and its offspring essentially explain that the general purpose of this statute is to protect federal agents and officers from being brought to trial in State courts for acts performed under the authority of the Federal

[4] For a complete historical discourse see Willingham v. Morgan, 395 U.S. 402, 405-406 (1969).

Government. Willingham, 395 U.S. at 406; Primate Protection League, 500 U.S. at 87; Mesa, 489 U.S. at 136-139.

Although this statute was enacted to provide for an absolute right of removal "whenever a suit in a state court is for any act 'under color' of federal office," federal jurisdiction arises only when "a federal interest in the matter" exists. Willingham, 395 U.S. at 406; and see Boyle v. United Technologies Corp., 487 U.S. 500, 511-512 (1988). Mesa enforced this federal interest requirement by clarifying the construction of section 1442(a). Noting the present-day lack of hostility of state prosecutors and state courts toward federal interests, the Court in Mesa reaffirmed the limitations of section 1442(a) by holding "[f]ederal officer removal under 28 U.S.C. Sect. 1442(a) must be predicated upon averment of a federal defense." Mesa, 489 U.S. at 139.

1. The Causal Connection Test

Consequently, "persons" seeking removal under section 1442(a)(1) must satisfy two requirements. A defendant must first show that a causal connection exists between what the officer or agent has done while acting under federal authority and the state prosecution.[5] A defendant must then

[5] This court finds the language in Mesa, 489 U.S. at 136-137, instructive with respect to the application of the causal connection test. Procedurally, this court must look first to the statutorily mandated causal connection test. The requirement of demonstrating a causal connection between what a federal officer has done and the State prosecution acts to statutorily overcome the "well-pleaded complaint" rule and permits a federal court to then determine whether the defendants' have presented a colorable federal defense.

present a colorable federal defense. The initial causal connection test is a statutory requirement that "serves to overcome the "well-pleaded complaint" rule which would otherwise preclude removal even if a federal defense were alleged." Mesa, 489 U.S. at 136.

To satisfy this first requirement, the defendant must establish that the federal official or agent has " 'direct and detailed control' over the defendant." Guillory v. Ree's Contract Service, Inc., 872 F. Supp. at 347 (quoting Fung, 816 F. Supp. at 572 (citing Ryan, 781 F. Supp. at 947)). To establish the requisite detail and control requirement, a defendant need only demonstrate that the plaintiff's state court action is derived from activities performed pursuant to federal direction. Fung, 816 F. Supp. at 572 (citing Gulati v. Zuckerman, 723 F. Supp. 353 (E.D. Pa. 1989)).

In the present case, the defendants were compelled under threat of criminal sanctions to deliver Agent Orange to the Defense Department. Between 1962 and 1971, these defendants supplied Agent Orange to the

Defense Department under DO-rated contracts.[6] Previous cases have recognized that the Defense Department expressly directed chemical companies to provide a detailed mixture of chemicals known as Agent Orange. See In Re Agent Orange Prod. Liab. Litigation, 996 F.2d 1425, 1436 (2d Cir. 1993), cert. denied, 114 S. Ct. 1125 (1994) (finding sufficient direction and control over ingredients specified in these government contracts to warrant the use of the government contractor defense notwithstanding the recent limitations on that defense by Boyle v. United Technologies Corp., 487 U.S. at 512); In re "Agent Orange" Prod. Liab. Litigation, 597 F. Supp. 740, 775, 849 (E.D.N.Y. 1984), aff'd, 818 F.2d 145 (2d Cir. 1987), cert. denied, 484 U.S. 1004 (1988); Uniroyal, Inc. v. Home Ins. Co., 707 F. Supp. 1368, 1370 (E.D.N.Y. 1988) (both cases analyzing federal control exercised over one defendant's production of Agent Orange).

[6] DO-rated contracts required companies to accept and fill governmental order regardless of existing contracts or orders. In fact, these companies were required to divert all civilian supplies of the herbicide to the Defense Department because of the ensuing shortage of Agent Orange.

Plaintiff urges this court to apply the holding of Ryan v. Dow Chemical Co., 781 F. Supp. 934, here. In Ryan the Eastern District of New York addressed the exact question currently before this court, -- whether private chemical companies' sale of the chemical compound agent orange to the federal government for use in the Vietnam War constituted actions under color of federal authority for purposes of 28 U.S.C. section 1442(a)(1). See Ryan, 781 F. Supp. 934. Ryan examined thoroughly the history and appropriate case law governing the application of 28 U.S.C. section 1442(a)(1) and held that the defendants failed to meet the requirement that agent orange was supplied " 'based upon actions taken pursuant to federal direction.' " Ryan, 781 F. Supp. at 950 (quoting Gulati v. Zuckerman, 723 F. Supp. 353 (E.D. Pa. 1989)). The court found that the government sought only to purchase a product previously being produced by these defendants. Because of this finding, the court held "the direct and detailed control over the acts for which the defendants are now being sued is therefore lacking." Id.

The court considered the general policy and purposes behind section 1442(a)(1) as supporting its decision. Id. It refused to invoke federal jurisdiction on the apparent lack State animus toward the federal interests at stake. The court held the federal procurement interest to be "nebulous" and stated that "[i]t is the concern for state court bias against the federal government that is the ultimate justification for section

1442(a)(1) removal." Id. at 951. Although a federal interest was a stake in this matter, Ryan found no indication that a State could not fairly adjudicate this federal interest and, therefore, remanded the case to State court. Ryan, 781 F. Supp. at 951.

This court respectfully disagrees with the decision in Ryan. Although the Supreme Court has added other requirements to invoke 1442(a)(1) jurisdiction, it has done nothing to limit the absolute right of removal permitted to those defendants who can meet the additional requirements. The Supremacy Clause entitles defendants who acted under color of federal authority to remove cases in which they have raised a colorable federal defense. Willingham, 395 U.S. at 406-407. Mesa merely reinforced the necessity of demonstrating a colorable federal defense and International Primate refused to permit federal agency removal under section 1442(a)(1). See Mesa, 489 U.S. at 139; International Primate, 500 U.S. at 85. In fact, the International Primate Court reinforced the Willingham decision and the importance of treating federal officers differently based on the "manipulable complexities involved in determining their immunity." International Primate, 500 U.S. at 87.

This court finds a substantial federal interest is at stake in this matter. The welfare of military suppliers is a federal concern that impacts the ability of the federal government to order and obtain military equipment at a reasonable cost. Federal interests are especially implicated

where, as in this case, the Defense Department expressly issued detailed and direct orders to the defendants to supply a certain product. The specificity of the order raises this issue to a federal concern subject to removal under section 1442(a)(1). The only remaining question is whether the defendants have raised a colorable federal defense.

Noting the Second Circuit's recognition of the availability of the government contractor defense in a similar situation,[7] this court finds the explicit specifications provided by the government contract orders create a reasonable probability that the government contractor defense would apply in this case.

The Supreme Court in Boyle held that:

> Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States. The first two of these conditions assure that the suit is within the area where the policy of the "discretionary function" would be frustrated – *i.e.*, they assure that *the design feature in question was considered by a Government officer, and not merely by the contractor itself.*

Boyle, 487 U.S. at 512 (emphasis added). The facts that establish the government contractor defense are questions for the jury. The

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[7] In re Agent Orange Prod. Liab. Litigation, 996 F.2d at 1436.

jurisdictional question herein merely asks whether the defendants' actions were taken under color of federal authority. This court finds that the government expressly considered the design feature in question, exercised direction and control over the substances used in the production of Agent Orange, and that the defendants provided the substances in conformity with those specifications. Consequently, the discretionary function of the government is called into question and the defendants acted in accordance with federal direction.

The Defense Department expressly contracted for a specific mix of chemicals.[8] The fact that Agent Orange was being produced in a substantially similar form for civilian use is inconsequential. Furthermore, an ample degree of federal interest is at stake when federal procurement costs are considered. The federal procurement costs that may result from applying the government contractor defense are sufficient to invoke federal

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[8] The contract expressly stated:
HERBICIDE, BUTYL ESTERS:
Of 2,4-D and 2,4,5-T in a 50-50 blend. Product shall consist of the following: 50% of N-Butyl 2,4-D conforming to MIL-H-51147 (MJ), dtd 19 Jul 63, except: acid purity shall be 99.0% minimum by weight; acid equivalent shall not be less than 79.0% nor more than 0.5% 50% of N-Butyl 2,4,5-T conforming to MIL-H-51148 (MJ) dtd 19 Jul 63, except; acid purity shall be 98.0% minimum by weight. The weight of the blend shall be 10.64 lbs per gallon. 35 gallon steel drum containing 580 pound of product.

jurisdiction notwithstanding the apparent lack of State court biases. Additionally, federal questions arise from the presentation of a colorable federal defense under 28 U.S.C. section 1442(a)(1).

2. A Colorable Federal Defense

Defendants contend that the federal common law government contractor defense and the federal defense of immunity under the Defense Production Act, 50 U.S.C. App. Sect. 2061 et seq., are colorable defenses for purposes of 28 U.S.C. section 1442(a)(1).

a. The Government Contractor Defense

The Fifth Circuit previously held that the government contractor defense is a colorable federal defense, especially when considering military design directives used to meet the exigencies of our national defense. Bynum v. FMC Corp., 770 F.2d 556, 569 (5th Cir. 1985). In Bynum, the Fifth Circuit found that the federal common law provided a basis for a corporation's government contractor defense. Id. at 577-578. Plaintiff, a National Guardsman, brought a products liability suit against a private contractor damages due to injuries that he suffered when a cargo carrier fell off a bridge. Id. The court examined, in great detail, the state of the law concerning the government contractor defense. See id. at 564-567. The court held that unique federal interests were implicated when the government contracts for specific design specifications for manufacture of military equipment. Id. at 574.

While explaining other court's decisions in similar cases, the court expressly adopted the reasoning of In re "Agent Orange" Product Liab. Litigation, 597 F. Supp. at 847; In re Related Asbestos Cases, 543 F. Supp. 1142, 1151 (N.D. Cal. 1982); McLaughlin v. Sikorsky Aircraft, 148 Cal.App.3d 203, 195 Cal.Rptr. at 768. Bynum, 770 F.2d at 567-568. In these cases, the courts found that federal common law provided a basis for the application of the government contractor defense for suits by servicemen against military contractors who provided products designed by the government. Id. at 567-568. The court in Bynum found that "[a]s long as the design specifications at issue are those for an instrumentality of war and were supplied by the government, the federal interests requiring the displacement of state law and judicial restraint in military matters are fully implicated. Id. at 575.

The court used a two tier analysis to determine whether federal common law provides a government contractor defense. Bynum first considered "whether the question at bar substantially bears upon 'uniquely federal' interests." Id. at 568 (citing Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1982); Jackson v. Johns-Manville Sales Corp., 750 F.2d 1314, 1323 (5th Cir. 1985) (en banc), cert. denied, 478 U.S. 1022 (1986). If federal interest are implicated, the court looks then to applicable federal common law or state law as the federal rule. Id. (citing United States v. Kimbell Foods, Inc., 440 U.S. 715, 728 (1979); Georgia

Power Co. v. Sanders, 617 F.2d 1112, 1115 (5th Cir. 1980) (en banc), cert. denied, 450 U.S. 936 (1981)).

It is important to note that Boyle did not substantially affect the application of the government contractor defense. The court simply eliminated the first element of the government contractor defense, the *Feres-Stencel* doctrine. Boyle, 487 U.S. at 512; Trevino v. General Dynamics Corp., 865 F.2d 1474, 1478 – 1479 (5th Cir. 1989). The Fifth Circuit found that Boyle did not change the law in this circuit " 'except to reject the ideological basis for contractor immunity based on *Feres*.' " Trevino, 865 F.2d at 1479 (quoting McGonigal v. Gearhart Indus., Inc., 851 F.2d 774, 777 (5th Cir. 1988)). The *Feres-Stencel* doctrine stated that the United States was immune from liability to a government contractor for contribution or indemnity when a party has recovered against the contractor for injuries due to actions partially caused by governmental negligence. See Trevino, 865 F.2d at 1478 n.3. The elimination of the *Feres-Stencel* doctrine has no bearing on this case.

In considering a motion to remand, this court is limited to analyzing whether a colorable defense has been raised. Except as a threshold question, it is unnecessary to determine the success of the defense. With this caveat in mind, Bynum supplies the answer to the question whether the government contractor defense, in this instance, is a colorable defense. The court stated:

> There can be no question that the design of military equipment is, at bottom, a military decision. Often dangerous designs must be used in the military context to meet the exigencies of our national defense, and even military equipment that is relatively safe for every day use may have to be operated on occasion under dangerous conditions or in a manner creating a high risk of harm.

Bynum, 770 F.2d at 569. The court further relied on In re "Agent Orange" Prod. Liab. Litigation, 534 F. Supp. 1046, 1054 n.1 (E.D.N.Y. 1982), modified, 100 F.R.D. 718 (E.D.N.Y. 1983), cert. denied, 465 U.S. 1067 (1984) in quoting:

> The purpose of the government contractor defense . . . is to permit the government to wage war in whatever manner the government deems advisable, and to do so with the support of suppliers of military weapons. Considerations of cost, time of production, risks to participants, risks to third parties, and any other factors that might weigh on the decisions of whether, when, and how to use a particular weapon are uniquely questions for the military and should be exempt from review by civilian courts.

This court finds no difference between this analysis of the government contractor defense in suits by servicemen against military contractors and the present case of civilians who worked under the same conditions in connection with these same military contractors. The defendant chemical companies supplied Agent Orange to the Defense Department under specific and express contractual agreements that the defendants were required by law to meet.

b. The Defense Production Act

Even if the government contractor defense is considered a standard of care to avoid liability,[9] this court finds that defendants have raised a colorable federal defense under section 707 of the Defense Production Act, 50 U.S.C. App. Section 2061 et seq. The Defense Production Act states, in relevant part: "No person shall be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with a rule, regulation, or order issued pursuant to this Act. . . ." 50 U.S.C. App. Sect. 2157. As recognized in Ryan, the defendants make out a colorable federal defense under this statute. See Ryan, 781 F. Supp. at 945. Agent Orange was produced and delivered to the Defense Department for use in the Vietnam War. See Id. (citing In re "Agent Orange" Prod. Liab. Litigation, 597 F. Supp. at 844). Defendants supplied this product pursuant to various DO-rated contracts between the government and the defendants. Although a dispute exists as to whether the Defense Production Act applies to plaintiff's claims, no dispute can exist over the application of this Act as a colorable defense.

For the foregoing reasons this court finds that defendants have raised a colorable federal defense. Having demonstrated that they acted under federal authority and having raised a colorable federal defense, this

[9] See Ryan, 781 F. Supp. at 945 (holding that the military contractor defense merely establishes a federal standard of care necessary to avoid liability, not a federal defense).

court holds that defendants are entitled to remove this case to federal court under 28 U.S.C. section 1442(a)(1). Defendants also raised a colorable defense under the Defense Production Act, 50 U.S.C. App. Section 2061 et seq.

3. Collateral Estoppel

Collateral Estoppel may be applied to bar the adjudication of issues previously decided by a court of competent jurisdiction. Copeland v. Merrill Lynch & Co., Inc., 47 F.3d 1415, 1421-1422 (5th Cir. 1995). Four conditions must be met in order to invoke this doctrine:

> (1) the issue under consideration is identical to that litigated in the prior action; (2) the issue was fully and vigorously litigated in the prior action; (3) the issue was necessary to support the judgment in the prior case; and (4) there is no special circumstance that would make it unfair to apply the doctrine.

Copeland, 47 F.3d at 1422 (citing United States v. Shanbaum, 10 F.3d 305, 311 (5th Cir. 1994)).

However, the Supreme Court set out different standards to apply to cases in which a plaintiff seeks to estop a defendant from litigating the same issues that the defendant lost against another plaintiff in a previous case – offensive collateral estoppel. Parklane Hosiery Co v. Shore, 439 U.S. 322, 331 (1979). In Parklane, the Court recognized that offensive collateral estoppel differs from defensive collateral estoppel because it does not promote judicial economy and may, in fact, be unfair to the defendant. Id. at 329-330. Plaintiffs may be more inclined to adopt a

"wait and see" attitude toward litigation because they will be able to rely on the previous judgment against a defendant but are not bound by the judgment if the defense wins. Id. at 330.

The Court noted the unfairness inherent with offensive collateral estoppel in the differing incentives to a defendant in vigorously litigating a suit for nominal damages. Id. This is especially true if the defendant does not foresee additional litigation arising from this incident or when the judgment is inconsistent with other judgments in favor of the defendant. Id.

In order to solve the problems inherent with offensive collateral estoppel, the Supreme Court granted broad discretion to the trial courts to determining whether a plaintiff may invoke offensive collateral estoppel. Parklane, 439 U.S. at 331; Copeland, 47 F.3d at 1423. The Court held that:

> The general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where, either for the reasons discussed above or for other reasons, the application of collateral estoppel would be unfair to the defendant, a trial judge should not allow the use of offensive collateral estoppel.

Id.

Plaintiff contends that the defendants are collaterally estopped from asserting that removal jurisdiction exists based on Judge Weinstein's prior holding in Ryan, 781 F. Supp. 934. Plaintiff's use of offensive collateral estoppel rests on the grounds that Ryan previously considered the defendants' removal jurisdiction under 28 U.S.C. section 1442(a)(1) and

found that the defendants failed to establish federal jurisdiction in that case. See id. at 950-953.

Ryan, however, was affirmed by the Second Circuit on other grounds. See In re Agent Orange Prod. Liab. Litigation, 996 F.2d at 1431-1432. The court did not address removal jurisdiction under 1442(a)(1). Considering similar issues of claim preclusion, the Fifth Circuit has declined to depart from the general rule that " ' . . . once an appellate court has affirmed on one ground and passed over another, preclusion does not attach to the ground omitted from its decision.' " Dow Chemical v. U.S. E.P.A., 832 F.2d 319, 323 & n. 24 (5th Cir. 1987) (quoting 18 C.Wright, A. Miller & E. Cooper, Federal Practice & Procedure Sect. 4421 (1981)).

Exercising its broad discretion to consider offensive collateral estoppel, this court finds that other reasons exist that do not warrant permitting plaintiff to use offensive collateral estoppel in this case. First, and foremost, this court is not bound to give preclusive effect to the decision of another district court, in another circuit, whose decision was affirmed grounds other than those plaintiff seeks to use in this case. Although instructive, Ryan has no precedential value in this circuit or for this court. Second, based on the evidence submitted, this court finds that the government exercised sufficient direct and detailed control over the production of Agent Orange to meet 28 U.S.C. section 1442(a)(1) requirements. For these reasons, this court exercises its discretion and

refused plaintiff's invitation to use offensive collateral estoppel in this case.

CONCLUSION

The defendants produced Agent Orange at the behest of the Defense Department for use in the Vietnam War. The Defense Department exercised sufficient direction and control over defendants' production of Agent Orange to consider defendants' actions to be "under color of federal authority." Defendants have also demonstrated that their actions may be protected by a colorable federal defense. Therefore, as persons acting under color of federal authority in producing this substance, defendants are entitled to remove this case from State court pursuant to 28 U.S.C. section 1442(a)(1).

For the foregoing reasons, plaintiff's motion to remand is in all things DENIED.

SIGNED, this the 2nd day of August, 1995.

S/
HOWELL COBB
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

MARGARET WINTERS,	{}	
	{}	
Plaintiff	{}	
	{}	
vs.	{}	**NO. 1:93-CV-164**
	{}	
DIAMOND SHAMROCK	{}	
CHEMICAL COMPANY, ET AL.,	{}	
	{}	
Defendants.	{}	
	{}	
	{}	

ORDER

On this 2nd day of August 1995, came on to be considered Plaintiff's Motion to Remand this action to the District Court of Jefferson County, Texas. Upon consideration of the respective contentions of the parties concerning the motion to remand, and in accordance with the attached memorandum, the court is of the opinion that the motion should be DENIED.

It is, therefore, ORDERED, ADJUDGED and DECREED that Plaintiff's Motion to Remand is in all things DENIED.

SIGNED this 2nd day of August, 1995.

S/
HOWELL COBB
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

MARGARET WINTERS,	{}	
Plaintiff	{}	
	{}	
vs.	{}	**NO. 1:93-CV-0164**
	{}	
DIAMOND SHAMROCK	{}	
CHEMICAL COMPANY; ET AL.,	{}	
Defendants	{}	
	{}	

MEMORANDUM OPINION

Before this Court is the Defendants' Motion for Summary Judgment, filed by Diamond Shamrock Chemical Company et al. Plaintiff Margaret Winters claims that the defendants negligently and defectively designed, formulated, tested, manufactured and marketed Agent Orange and that, as a result, her exposure to Agent Orange caused her to develop non-Hodgkin's lymphoma, a form of cancer. For the reasons stated below, this Court finds that the defendants should prevail as a matter of law on plaintiffs' claims on statute of limitations grounds. This court therefore GRANTS defendants' motion.

FACTUAL BACKGROUND

Plaintiff Margaret Winters (Winters), a registered nurse, was employed by the United States Agency for International Development in 1966. Following a six-month orientation program, Winters was sent to Vietnam in August of 1966. Winters worked as a nurse in Vietnam until October of 1967.

While in Vietnam, Winters lived in the city of Saigon and worked in a hospital called Choray, which was in Cholon, a suburb on the outskirts of Saigon. Except for a few short trips, Winters spent all of her time in Saigon and Cholon.

Within several months of her arrival in Vietnam, Winters developed a blister on her left eye. The blister eventually healed, but a similar blister subsequently developed on her right eye. The second blister eventually went away as well.

Winters returned to the United States in 1967, after being in Vietnam for approximately fourteen months. From 1967 until her death in 1996, Winters lived in Chicago, Illinois.

Approximately ten years after returning to the United States, in February of 1977, Winters noticed a hemorrhage in her left eye. The hemorrhage disappeared in a couple of weeks, but later re-appeared. In 1979, the same symptoms appeared in her right eye. In 1980, Winters was told that she might have lymphoma.

In June of 1981, Winters learned that tumors were present behind both of her eyes. She underwent radiation treatment, which greatly reduced the size of the tumors. In August of 1983, Winters developed a lump under her arm which was subsequently diagnosed as non-Hodgkin's lymphoma.

Despite the fact that Winters is unable to identify any direct exposure to Agent Orange during her time in Vietnam, she alleges that her lymphoma was caused by exposure to the herbicide. In 1993, Winters filed suit alleging claims of negligence, strict products liability and breach of warranty based on allegations that the defendants negligently and defectively designed, formulated, tested, manufactured and marketed Agent Orange.

ANALYSIS

I. SUMMARY JUDGMENT STANDARDS

Summary judgment is appropriate when the moving party is able to demonstrate that "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); see Celotex Corp. v. Catrett, 477 U.S. 317, 323-25 (1986); Anderson v. Liberty

Lobby, Inc., 477 U.S. 242, 250 (1986); Matsushita Elec. Indus. Co., Ltd. V. Zenith Radio Corp., 475 U.S. 574, 585-88 (1986).[1]

It is unnecessary for the movant to negate elements of the nonmovant's case. Lujan v. National Wildlife Fed'n, 497 U.S. 871, 885 (1990). If the movant shows that no genuine issues of fact exist, however, the nonmovant "must go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial." Little v. Liquid Air Corp., 37 F.3d 1069, 1071 (5th Cir. 1994) (citing Celotex, 477 U.S. at 325). The nonmovant's burden is not satisfied with

> "some metaphysical doubt as to the material facts," Matsushita, 475 U.S. at 586, by "conclusory allegations," Lujan, 497 U.S. at 871-73, by "unsubstantiated assertions," Hopper v. Frank, 16 F.3d 92 (5th Cir. 1994), or by only a "scintilla" of evidence, Davis v. Chevron U.S.A., Inc., 14 F.3d 1082 (5th Cir. 1994).

Little, 37 F.3d at 1075. At this point, summary judgment is appropriate if the nonmoving party fails to come forward with sufficient facts and law demonstrating a basis for recovery. Id. at 1071.

The Court must view the evidence introduced and all factual inferences from the evidence in the light most favorable to the party opposing summary judgment. Eastman Kodak v. Image Technical Servs., Inc., 504 U.S. 451, 456 (1992); Anderson, 477 U.S. at 255; Matsushita,

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[1] A "material" fact is one that might affect the outcome of the suit under the applicable substantive law. Anderson, 477 U.S. at 248. In order for a dispute to be "genuine," the evidence before the Court must be such that a reasonable jury could return a verdict for the nonmoving party. Id.; see also Judwin Properties, Inc. v. United States Fire Ins. Co., 973 F.2d 432, 435 (5th Cir. 1992).

475 U.S. at 587. However, this favorable presumption for the nonmovant exists only when the nonmovant presents an actual controversy of fact. The court will not assume controversy when insufficient facts exist to sustain the party's complaint. Little, 37 F.3d at 1075; see Lujan, 497 U.S. at 888.

II. Statute of Limitations Analysis

This case is properly before this court pursuant to 28 U.S.C. Sect. 1442(a)(1). " 'A federal court's role under Sect. 1442(a) is similar to that of a federal court sitting in diversity.' " Gallelli v. Professional Ins. Management, 1994 WL 45729, at *3 (E.D. Pa. Feb. 10, 1994) (citing Mitchell v. Aluisi, 872 F.2d 577 (4th Cir. 1989)). Accordingly, the federal court applies the choice of law rules of the forum state to determine the applicable law. Gallelli, 1994 WL 45729, at *3. The choice of law rules of Texas thus determine which state's statute of limitations applies to plaintiff's claims.

Therefore, in the context of limitations, Texas substantive law controls the issues present in the instant litigation. See, e.g., Woodruff v. A.H. Robins Co., Inc., 742 F.2d 228, 229 (5th Cir. 1984) (per curiam). The issue of law before this court with regard to defendants' motion is whether plaintiff's claims are barred by the applicable statute of limitations. The negligence and products liability claims will first be addressed. The warranty claims will be analyzed separately.

A. Negligence and Products Liability Claims

Winters asserts claims of negligence and strict products liability based on allegations that defendants negligently and defectively designed, formulated and manufactured Agent Orange. In Texas, causes of action for personal injuries arising out of negligence and strict products liability claims are governed by a two-year statute of limitations, which specifically provides in pertinent part that "a person must bring suit for . . . personal injury . . . not later than two years after the day the cause of action accrues." TEX. CIV. PRAC. & REM. CODE ANN. Sect. 16.003(a) (Vernon 1986 & Supp. 1996). Therefore, claims which are not brought within a two-year period from the date the cause of accrues are barred as a matter of law.

Generally, a cause of action accrues when a wrongful act causes an injury. Timberlake v. A.H. Robins Co., Inc., 727 F.2d 1363, 1364 (5th Cir. 1984). Winters was in Vietnam between August of 1966 and October of 1967 and is alleging that exposure took place at some undefined time during this fourteen-month stay in Vietnam. If Winters was in fact exposed to Agent Orange, her cause of action accrued no later than October of 1967. Under this general rule, she would have had two years from the date of her departure from Vietnam to bring suit.

Texas courts have recognized an exception to this general rule, the "discovery rule," which applies where a claimant is unable to know of an injury or the cause of an injury at the time it occurred. Id. When the discovery rule applies, the statute of limitations is tolled until the Plaintiff discovers, or through the exercise of reasonable care and diligence should have discovered, the nature of her injury and its cause in fact. See, e.g., Glasscock v. Armstrong Cork Co., 946 F.2d 1085, 1092 (5th Cir. 1991), cert. denied, 503 U.S. 1011 (1992); Mann v. A.H. Robins Co., Inc., 741 F.2d 79, 81 (5th Cir. 1984); Moreno v. Sterling Drug, Inc., 787 S.W.2d 348, 351 (Tex. 1990). Giving Winters every possible chance to recover, this court will assume that the discovery rule is applicable in this situation, meaning that the accrual of the cause of action was not in October of 1967, but rather some later date.

Although Winters suffered from hemorrhages in both eyes in the late 1970s, was told that she might have lymphoma in 1980 and underwent radiation treatment for tumors behind both eyes in 1981, her lymphoma was not diagnosed definitely until 1983. Assuming that the discovery rule applies and that the events occurring prior to the definite diagnosis in 1983 did not trigger the running of the statute of limitations, Winters had two years from the date of the diagnosis or shortly thereafter because at that point she either knew or should have known of the alleged cause of her injury.

The long-standing rule is that a plaintiff has an affirmative duty to attempt to determine the cause of her injury. " 'Whatever is notice enough to excite attention and put the party on his guard and call for inquiry, is notice of every thing to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it.' " Wood v. Carpenter, 101 U.S. 135, 141 (1879) (citations omitted). As stated by the Fifth Circuit, "[a] plaintiff who has learned of facts which would cause a reasonable person to inquire further must proceed with a reasonable and diligent investigation, and is charged with the knowledge of all facts such an investigation would have disclosed." Jensen v. Snellings, 841 F.2d 600, 607 (5th Cir. 1988).

Winters did have notice of the possible link between exposure to Agent Orange and her lymphoma. She was diagnosed definitely with lymphoma in 1983, and thus knew then if not before that she had serious health problems. Furthermore, according to her deposition, Winters had read newspaper reports concerning alleged health effects from the spraying of Agent Orange in Vietnam at or about the same time of her diagnosis.

Moreover, Winters was a registered nurse. It is assumed that someone with her knowledge and experience in the nursing field would have access to information about possible health effects of Agent Orange exposure and would be aware of these effects. Even more importantly, Winters is charged with this knowledge due to extensive publicity in

general about the subject. A plaintiff is charged with knowledge of information that has been made public through the media. See generally United Klans of America v. McGovern, 621 F.2d 152 (5th Cir. 1980) (affirming order granting summary judgment on ground that action was barred by statute of limitations, where plaintiffs, by exercise of due diligence, should have known of their claim more than a year prior to the time they filed their action, since defendants' press conference should have put them on notice of their claim and imposed a duty to investigate the possibility of a claim).

Well before 1993 when Winters eventually filed suit alleging a link between Agent Orange exposure and her lymphoma, Winters was living in Chicago when much publicity focused on Agent Orange-related news stories. In January of 1984, an Agent Orange Bill was passed by the U.S. House of Representatives. The bill provided disability benefits to veterans exposed to Agent Orange. News reports describing the bill appeared on national news programs and in the Chicago Sun-Times. Cancer was specifically identified as one of the compensable diseases. Additionally, as early as 1984, news articles in the Chicago Tribune and the Chicago Sun-Times described claims of health effects, including cancer generally and non-Hodgkin's lymphoma specifically, allegedly caused by Agent Orange exposure. Specific articles that appeared in May of 1984 reported the story of Admiral Zumwalt and his son, Russell, who claimed that Russell's

lymphoma was caused by exposure to Agent Orange in Vietnam. Other articles in the Chicago Tribune and Chicago Sun-Times in 1984 recounted the highly publicized testimony of Vietnam veterans before a Chicago City Hall Commission investigating claims of health injuries resulting from exposure to Agent Orange. Additionally, on September 4, 1987, an Associated Press article appeared in both the Tribune and the Sun-Times. That article reported that "VA scientists said they found 'statistically significant' higher rates for lung cancer and non-Hodgkin's lymphoma . . . For non-Hodgkin's lymphoma, the rate is 110 percent greater than the expected number."

Also, in 1984, there was extensive publicity concerning the preparations for the class action trial of the claims of over two million Vietnam veterans, which culminated in the $180 million settlement reached on May 7, 1984. For months following the announcement of the settlement, both local and national media detailed the settlement terms and the fairness hearings held by Judge Weinstein in several cities, including Chicago on August 13 and 14, 1984.

In sum, Winters, a registered nurse with many years' experience in the medical profession, can be fairly held to have known of, understood, and assessed the significance of the many developments concerning the "Agent orange story" that were widely disseminated in the news media during the 1980s, or under the circumstances, a person of her education and

experience objectively should have so known. Given the fact that Winters was put on notice of a possible claim by 1983 due to her diagnosis of non-Hodgkin's lymphoma that was simultaneous with extensive media coverage of possible links between Agent Orange and serious health problems, including non-Hodgkin's lymphoma, her claim accrued at the latest by the mid-1980s, either 1984, 1985 or 1986. Winters has failed to show there are material issues of fact to escape the applicable statutes of limitations, and therefore, defendants are entitled to judgment as a matter of law. Thus, claims by Winters alleging negligence and liability for defective manufacturing, marketing and warning must be dismissed as time-barred.

B. Breach of Implied Warranty Claim

Winters also claims that defendants breached implied warranties of fitness in the design and manufacture of Agent Orange. As previously discussed, Texas substantive law controls the issues present in the instant litigation, including the statute of limitations defense. See e.g., Woodruff, 742 F.2d at 229. In Texas, a claim based on an alleged breach of an implied warranty must be brought within four years after the cause of action accrues. TEX. BUS. & COM. CODE ANN. Sect. 2.725(a) (Vernon 1994). In warranty cases, "a cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the

breach," and a breach of warranty occurs on the date the goods are delivered. Id.; see also Timberlake, 727 F.2d at 1367.

The Texas Supreme Court has expressly held that actions based on breach of warranty are not subject to the discovery rule unless future performance was contemplated under the contract. Safeway Stores, Inc. v. Certainteed Corp., 710 S.W.2d 544, 546 (Tex. 1986). The Court also stated in Safeway that only express warranties may explicitly extend to future performance. Id. Since Winters has asserted a claim based on a breach of an implied, rather than express, warranty, it appears that the discovery rule is inapplicable in this situation..

Assuming then that the discovery rule does not apply, 1967 is the latest year in which defendants could have delivered to the United States for use in Vietnam any Agent Orange to which Winters could have been exposed since she left Vietnam in that year. Under Texas statutory law, therefore, the claim for breach of implied warranty accrued no later than in 1967. Furthermore, as discussed previously with respect to the negligence and products liability claims, even if the discovery rule does apply, any claims by Winters were time-barred by the mid-1980s, either 1984, 1985 or 1986, at the latest.

Winters has failed to show there are material issues of fact concerning a delay in the accrual of the applicable statutes of limitations and defendants are entitled to judgment as a matter of law. Therefore, because Winters brought suit in 1993, she failed to bring her breach of implied warranty claim within the four-year statute of limitations period after the cause of action accrued and this claim must be dismissed.

CONCLUSION

Any claim that existed for Winters was time-barred by the time she filed suit in 1993. As a result, defendants have succeeded in showing there is no genuine issue of material fact regarding any of plaintiffs' claims which would allow recovery. Furthermore, defendants have shown as a matter of law why they should prevail against plaintiffs. Because of this finding, the court pretermits ruling on Defendants' Joint Motion for Summary Judgment asserting the Government Contractor Defense.

It is therefore ORDERED that Defendants' Motion for Summary Judgment be GRANTED at Plaintiffs' costs.

SIGNED this the 25th day of September 1996.

S/
HOWELL COBB
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

MARGARET WINTERS,	{}	
Plaintiff	{}	
	{}	
vs.	{}	**NO. 1:93-CV-0164**
	{}	
DIAMOND SHAMROCK	{}	
CHEMICAL COMPANY; ET AL.,	{}	
Defendants	{}	
	{}	

ORDER GRANTING DEFENDANTS' JOINT MOTION FOR SUMMARY JUDGMENT

On this day came for consideration Defendants' Joint Motion for Summary Judgment, filed in this cause by the defendants Diamond Shamrock Chemicals Company, The Dow Chemical Company, Monsanto Company, Uniroyal, Inc., Hercules Incorporated and T.H. Agriculture & Nutrition Company, Inc. (collectively, the "Defendants"). The court after examining the Motion and the Summary Judgment Evidence and all of the papers and evidence submitted in support of and in opposition to the Motion is of the opinion and finds that there is no genuine issue of material fact as between Plaintiffs and Defendants, and that Defendants are entitled to Summary Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that Defendants' Joint Motion for Summary Judgment is granted for the reasons stated in the Memorandum Opinion of this date. It is further ordered that the Complaint is dismissed in its entirety with prejudice, that Plaintiffs take nothing against any of the Defendants, and that costs are taxed against the Plaintiffs.

All relief not specifically granted herein is DENIED.

SIGNED this the 25th day of September, 1996.

S/
HOWELL COBB
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 97-40113

MARGARET WINTERS,

Plaintiff-Appellant,

versus

DIAMOND SHAMROCK CHEMICAL COMPANY, ET AL.,

Defendants,

THE DOW CHEMICAL COMPANY; MONSANTO COMPANY; UNIROYAL, INCORPORATED; HERCULES, INC.; THOMPSON-HAYWARD CHEMICAL COMPANY, also known as Thompson Chemical Corporation; T H AGRICULTURE & NUTRITION COMPANY, INC.; DIAMOND SHAMROCK CHEMICAL COMPANY,

Defendants-Appellees.

Appeal from the United District Court for the Eastern District of Texas

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Before GARWOOD, JOLLY, and HIGGINBOTHAM, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

This case is part of the Agent Orange saga. This particular appeal presents a question regarding the reach of the offensive collateral estoppel doctrine where the issue sought to be precluded from relitigation was decided in a trial court outside this circuit and the foreign court's decision was not subjected to appellate review. We hold today that the district court properly denied such a judgment preclusive effect under the collateral estoppel Doctrine, that we do indeed have jurisdiction under the Federal Officer Removal Statute, and that we therefore may reach the merits of this appeal. In so doing, we affirm the judgment of the district court dismissing the complaint as barred by the Texas statute of limitations.

I

The Defendants supplied the American government with Agent Orange between 1962 and 1971. Agent Orange is an equally mixed herbicidal blend of 2,4-Dichlorophenoxyacetic Acid (2,4-D) and 2,4,5-Trichlorophenoxyacetic Acid (2,4,5-T). The blending production of these two acids can produce varying amounts of 2,3,7,8 Tetrachlorodibenzo-p-dioxin, an extremely toxic substance. The voluminous lawsuits involving Agent Orange, including this one, center around the physical defects and diseases allegedly caused by exposure to this dioxin.

Margaret Winters, now taken from this world by the disease allegedly caused by Agent Orange, worked as a civilian nurse for the United States Agency for International Development ("U.S.AID") in Vietnam in 1966 and 1967. During her 14-month overseas tenure, Winters lived in Saigon and worked at a hospital located in Cholon, a suburb of Saigon. While Winters was living in Vietnam, the American government employed the herbicide Agent Orange as a defoliator, in order to provide its military personnel with some tactical advantage.

Winters returned to Chicago in October 1967. Nearly ten years later, she began to experience health problems. Specifically, her eyes hemorrhaged and, in 1981, tumors were discovered behind both of them. She was diagnosed in August 1983 with non-Hodgkin's lymphoma ("NHL"). Winters filed suit ten years later after reading an article in the local newspaper reporting a link between NHL and Agent Orange. She alleged that the defendants formulated, manufactured, and sold Agent Orange to the United States military, that the herbicide was defective and unreasonably dangerous, that she was exposed to Agent Orange while in Vietnam, and that the herbicide caused her usually-terminal cancer. During the pendency of this action, Winters succumbed to the disease and the torch was passed to her estate.[1]

[1] For uniformity, we refer to the plaintiff as "Winters" throughout the opinion.

II

The defendants removed the state-filed action to federal court in the Eastern District of Texas pursuant to both the Federal Officer Removal Statute, 28 U.S.C. Sect. 1442(a)(1), and the court's original jurisdiction, premised on the federal law governing military procurements, 28 U.S.C. 1331. The Judicial Panel on Multidistrict Litigation determined that Winters' suit was sufficiently similar to others decided by Judge Jack Weinstein in the Eastern District of New York and transferred the action to that district. Winters filed a motion to remand the case to state court, alleging that the defendants' asserted grounds for removal were defective. Judge Weinstein, professing a lack of expertise with Texas substantive law, transferred the case back to the Eastern District of Texas.

The Texas district court denied Winters' motion to remand on the basis that the defendants sufficiently demonstrated that they were entitled to a federal forum under the Federal Officer Removal Statute. The defendants then moved for a judgment as a matter of law, arguing that they were entitled to a judgment on the basis of the military contractor defense and laches. The court granted summary judgment for the defendants on statute-of-limitations grounds without having received a response from Winters. Winters then filed a motion for a new trial and/or rehearing and submitted evidence in support of that motion. The district court declined to reconsider its ruling and Winters timely appealed.

III

Winters initially argues that the district court erred when it refused to offensively apply the doctrine of collateral estoppel to preclude the defendants from arguing that the case was properly removed from state court. She maintains that the defendants had a full and fair opportunity to argue their position in Ryan v. Dow Chem. Co., et al.[2] and that the Ryan Court's decision to remand should have preclusive effect against the defendants in the present action.

A

The seminal case setting out the parameters of the *offensive* use of collateral estoppel is Parklane Hosiery Co. v. Shore, 439 U.S. 322, 99 S.Ct. 645 (1979). Before addressing Parklane, however, let us make a few observations generally about the use of collateral estoppel, or issue preclusion. Four conditions must be met before collateral estoppel may be applied to bar relitigation of an issue previously decided by a court of competent jurisdiction:

> (1) the issue under consideration is identical to that litigated in the prior action; (2) the issue was fully and vigorously litigated in the prior action; (3) the issue was necessary to support the judgment in the prior case; and (4) there is no special circumstance that would make it unfair to apply the doctrine.

[2] 781 F.Supp. 934 (E.D.N.Y. 1992).

Copeland, et al. v. Merrill Lynch & Co., et al., 47 F.3d 1415, 1422 (5th Cir. 1995) (citing United States v. Shanbaum, 10 F.3d 305, 311 (5th Cir. 1994)).[3]

As noted above, the fourth factor pertinent to application of the collateral estoppel doctrine is whether any "special circumstances" exist that would make issue preclusion unfair. The Supreme Court, in Parklane, set out examples of such "special circumstances" when application is sought offensively. One is whether the plaintiff easily could have joined the previous action, but instead chose to "wait and see" whether a favorable judgment would be rendered. Parklane, 439 U.S. at 330-31; 99 S.Ct. at 651-52. A second consideration is whether the defendant had the incentive to defend vigorously, especially if sued only for nominal damages or if future suits were not foreseeable. Id. Third, offensive collateral estoppel asks whether the judgment upon which the plaintiff seeks to rely is itself inconsistent with a previous judgment in favor of the defendant. Id.

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[3] In addition to those four factors, we have set out a few other safeguards that must be present before estoppel may be employed. One such safeguard is a requirement that the "facts and the legal standard used to assess them are the same in both proceedings." Copeland, 47 F.3d at 1422. A second involves an inquiry into whether a "'new determination of the issue is warranted by differences in the quality or extensiveness of the procedure followed in the two courts.'" Id. at 1423 (quoting RESTATEMENT (SECOND) OF JUDGMENTS 28(3)). Third, unless the issue sought to be precluded from relitigation was a "critical and necessary part" integral to the prior judgment, collateral estoppel may not apply. Id.

"The general rule should be that in cases . . . where, either for the reasons discussed above or for other reasons, the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel." Id. at 331 (emphasis added). The Court specifically noted, however, that a district court has broad discretion to determine whether collateral estoppel is appropriately employed offensively to preclude issue relitigation. Id. at 331; Copeland, 47 F.3d at 1423 (also noting "broad discretion" of district court, particularly with respect to use of offensive collateral estoppel). We thus review the district court's refusal to offensively apply collateral estoppel only for abuse of the broad discretion afforded it. Copeland, 47 F.3d at 1423.

With this general understanding of offensive collateral estoppel, we turn to the specifics of this action. The defendants do not dispute that they had adequate incentive and opportunity to fully and fairly litigate this removal question before the district court in New York. Furthermore, no special procedures inured to their benefit in the action before the Texas court that did not equally apply to the case before the New York court. The removal issue litigated in New York was identical to that litigated in Texas and was integrally related to – indeed, it constituted the crux of – the particular judgment. With all concrete factors, then, being in favor of applying offensive collateral estoppel, we consider whether any "special circumstances" exist that make the application inappropriate.

B

Judge Weinstein, in Ryan, considered and rejected the defendants' argument that the Federal Officer Removal Statute provided the federal court with removal jurisdiction. 781 F.Supp. at 944-51. The district court then remanded the action to state court, but characterized its ruling on 1442 as "close" and certified its decision for interlocutory review. Id. at 953. The Second Circuit dismissed the interlocutory appeal for lack of appellate jurisdiction over a remand order.[4] Thus, no reviewing court was ever able to determine the correctness of Judge Weinstein's ruling on this matter – a ruling which Judge Weinstein recognized as close, and indeed so uncertain that he certified it for appeal.

The appeal before us thus presents a question concerning the propriety of applying collateral estoppel offensively to a jurisdictional determination – i.e., a remand order – that was not legally capable of appellate review. In the absence of specific precedent, we will look for guidance in other type cases in which the absence of appellate review has been a factor in barring the use of offensive collateral estoppel. See Matter of Schwager, 121 F.3d 177, 183-84 (5th Cir. 1997); c.f. Hicks v. Quaker Oats Co., 662 F.2d 1158, 1168-73 (5th Cir. Unit A 1981) (refusing to afford

[4] Ryan, No. 92-8008 (2d Cir. April 15, 1992) (denying petition for 1292(b) review); Ryan, No. 92-8008 (2d Cir. May 22, 1992) (denying motion for reconsideration); Ryan, No. 92-7487 (2d Cir. June 16, 1992) (dismissing appeal).

unappealed alternate grounds of decision offensive collateral estoppel effect).

In Schwager, the bankruptcy court had applied the doctrine of offensive collateral estoppel to the jury's factual findings in the underlying state court judgment. With relitigation of those facts precluded, the bankruptcy court had determined that Schwager's debt was nondischargeable. On appeal, Schwager argued that collateral estoppel was improper because the state jury's findings had been in the conjunctive, which made it impossible to determine the basis of the jury's determination of Schwager's debt. Schwager, 121 F.3d at 182-83.

Because the underlying judgment was that of a state court, the Schwager Court looked to Texas law to determine the proper application of the estoppel doctrine. Id. at 181 (citing Garner v. Lehrer (In re Garner), 56 F.3d 677, 679 & n.2 (5th Cir. 1995) (citing 28 U.S.C. 1738)). Texas courts apply the Restatement (Second) of Judgments 27 [5] as their general rule of issue preclusion. Id. at 183 (citing Gober v. Terra + Corp. (In re Gober), 100 F.3d 1195, 1203 n.6 (5th Cir. 1996)). Comment i to the Restatement provides

[5] Section 27 provides:
When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

> i. *Alternative determinations by court of first instance.* If a judgment of a court of first instance is based on determinations of two issues, either of which standing independently would be sufficient to support the result, the judgment is not conclusive with respect to either issue standing alone.

Comment O, however, elaborates further on the situation presented in comment i:

> If the judgment of the court of first instance was based on a determination of two issues, either of which standing independently would be sufficient to support the result, and the appellate court upholds both of these determinations as sufficient and accordingly affirms the judgment, the judgment is conclusive as to both determinations. In contrast to the case discussed in Comment i, the losing party has here obtained an appellate decision on the issue, and thus the balance weighs in favor of preclusion.

Texas courts had yet to address comment O, and the Schwager Court turned to federal circuit cases for guidance in its application. 121 F.3d at 183. The court reasoned that comment O allowed for issue preclusion only when the appellate court had considered the *specific* issue sought to be barred from relitigation by collateral estoppel. Id. at 183-84 (citing Arab African Int'l Bank v. Epstein, 958 F.2d 532, 537 (3d Cir. 1992); (Hicks v. Quaker Oats Co., 662 F.2d 1158, 1168 (5th Cir. Unit A Dec. 1981)). Because the state appellate court had not passed on the specific issue that the bankruptcy court had estopped Schwager from relitigating, the Schwager Court determined that the doctrine's application was erroneous. Id. at 184. The Schwager Court so held even though lack

of review by the state appellate court was occasioned by Schwager himself. The state court had provided Schwager with no less than three opportunities to properly brief his appeal. 121 F.3d at 184. When Schwager declined to comply the third time, the state court struck the majority of his points of error, including the issues sought to be precluded from relitigation. Id. It is important to note then that the Schwager Court disallowed issue preclusion solely on the premise that the state appellate court had not specifically passed on the specific issues – even though Schwager's actions directly had contributed to that absence of review.

The court in Hicks v. Quaker Oats Co. faced a somewhat analogous situation and made a similar ruling. 662 F.2d 1158 (5th Cir. Unit A Dec. 1981).[6] The district court in Hicks applied collateral estoppel to two issues – reliance and promissory estoppel – that had been decided adversely to the defendants in a previous litigation before the same district judge. We determined that application of the doctrine was erroneous for several reasons. One, which is of particular relevance to our case today, was that the district court had relied on a determination that had been subject to no appellate review.

[6] We note, as did the Hicks Court, that federal law of issue preclusion applied because the prior decision had been issued by a federal court, albeit in a diversity action. 662 F.2d at 1166. For the same reason, federal law applies to the instant case.

The Hicks Court further noted that special concerns with collateral estoppel are raised when it is used offensively, especially "where plaintiffs are relying on an alternative ground of decision of a court of *first* instance." Id. at 1170-72 (emphasis added). We particularly stressed the great importance of fairness considerations when determining whether offensive estoppel should be allowed. "Although the decision to apply offensive collateral estoppel rests in the discretion of the trial judge, . . . this discretion is not unbounded and must be channeled through the consideration of fairness listed in Parklane, along with any other considerations of fairness which the trial judge deems appropriate." Id. at 1172-73 (noting Parklane's factors were not exhaustive).

The Hicks Court stopped short of applying to all cases the proposed Restatement rule that denies estoppel effect to unappealed alternative grounds of decision. Id. at 1173 (referring to Restatement (Second) of Judgments Section 68, comment I (Tent. Draft No. 4, April 15, 1977) (now at Section 27, comment I)). It did, however, "hold that such a rule is especially appropriate in the case of offensive collateral estoppel, where the problems of assuring a rigorous determination of all grounds of decision are magnified." Id. In the light of all the concerns involved, the court reversed the district court's application of offensive collateral estoppel.

We have since adhered to the Hicks decision disallowing offensive collateral estoppel effect to an alternative ground left unaddressed by the appellate court. See Dow Chemical v. U.S. E.P.A., 832 F.2d 319, 323 (5th Cir. 1987); Breen v. Centex Corp., 695 F.2d 907, 915-16 (5th Cir. 1983). In Dow Chemical, Dow had argued that we should not give estoppel effect to the issue in question because we had affirmed the district court's earlier judgment on other grounds. We agreed and followed Hicks, refusing to depart from the accepted rule that "once an appellate court has affirmed on one ground and passed over another, preclusion does not attach to the ground omitted from its decision." Dow Chemical, 832 F.2d at 323. We explained the rationale for the rule as a response to concerns that an appellate court's choice of grounds on which to base its decision could "arbitrarily and unfairly preclude any review of alternative grounds reached by the district court." Id. n.25. Furthermore, we applied the rule in Dow Chemical to bar estoppel even though Dow itself had sought to prevent review of the disputed issue in the earlier action. Id.

C

An element obviously common to each of the cases is the unreviewed nature of the issue sought to be precluded from relitigation. In Schwager, Hicks, and Dow Chemical, an appellate court never passed on the validity of the underlying resolution of the specific issue (or issues) whose relitigation another party later sought to bar. The reasoning for

rejecting estoppel in those cases appears for the most part to hinge on the lack of incentive that the losing litigant has to appeal the erroneous ground from a judgment premised on alternative grounds.[7]

Indeed, the Restatement notes that it is of "critical importance" that the "losing party, although entitled to appeal from both determinations, might be dissuaded from doing so because of the likelihood that at least one of them would be upheld and the other not even reached." Restatement (Second) of Judgment 27, comment i; see also Hicks, 662 F.2d at 1171. Comment O, which allows for preclusion when alternative determinations have each been appealed and decided, points out that "the balance weighs in favor of preclusion . . . [because] the losing party has here obtained an appellate decision on the issue." Restatement (Second) of Judgments 27, comment O (noting conclusiveness attaches only to issue directly addressed by appellate court).

[7] None of the cases, however, contemplated that the parties lacked any incentive to litigate the issue before the court of first instance. Presumably, the issue sought to be precluded in a later case had been subjected to a thorough vetting at the time it was first tried. The appellate court simply either never had – as in Hicks where the losing litigant did not appeal the earlier decision – or did not take advantage of – as in Schwager and Dow Chemical where the appellate court affirmed on other grounds – the opportunity to pass on the propriety of the issue's resolution. Implicit in each holding, then, is a requirement of appellate review.

The rationale behind the Restatement focuses on the fairness factor set out by Parklane. Section 27 states that relitigation of an issue will be precluded in a later action if the issue was actually litigated and its determination essential to the judgment. In such a straightforward situation, the losing litigant has ample incentive to appeal the adverse ruling and sufficient notice that it will be bound to that determination in subsequent actions. Thus, allowing issue preclusion under these circumstances is considered fair. In contrast, when a judgment is premised on alternative grounds, the losing litigant is said to lack that full incentive to appeal, thus rendering it unfair to bind him to either unappealed determination. Still further, we have applied this alternative grounds rule even where the failure of the appellate court to address the specific issue resulted because the losing litigant sought to prevent its review.[8] Dow Chemical, 832 F.2d at 323 n.25.

On a continuum from the most fair to the least fair (depending on the incentive of the losing party to appeal the judgment of the court of first instance), the situation in which it is most fair to apply offensive collateral estoppel effect is when the determination of the first case rests on a single issue, thus providing the losing party ample opportunity and incentive to appeal. Next on the continuum of fairness is the determination based on

[8] See Restatement (Second) of Judgments Section 27, comment i (noting non-preclusion rule of judgments premised on alternative grounds should be applied uniformly despite case specific considerations weighing in favor of preclusion).

alternative and independent grounds, a situation which, as a rule, does not merit preclusion because of the lack of incentive the losing party has to appeal, i.e., its inherent "unfairness." This rule holds true even when the losing party can appeal; he simply lacks incentive to do so. As the continuum diminishes in fairness, the next situation is the case before us: where the losing litigant never had an opportunity to appeal. It is clear that fairness considerations weigh heavily against binding a party whose ability to appeal is precluded by a prohibition of law.

Indeed, the Restatement itself specifically provides for an exception to preclusion when "[t]he party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action."[9] Restatement (Second) of Judgments Section 28(1). The comment to that subsection notes that "the availability of review for the correction of errors has become critical to the application of [the]

[9] We should make special note that this section of the Restatement is not limited to *offensive* collateral estoppel, but is applicable to collateral estoppel in general. Usually, when offensive collateral estoppel is at issue, the restrictions on the use of the doctrine are more stringent, as indeed Parklane makes clear.

preclusion doctrine." Restatement (Second) of Judgments Section 28(1), comment a; see also 18 Wright, Miller, & Cooper, Federal Practice and Procedure 4421 at 203 (1981).

We thus see that the availability of review is of paramount importance to the issue of preclusion. In Avondale Shipyards, Inc. v. Insured Lloyd's, 786 F.2d 1265 (5th Cir. 1986), we discussed whether preclusive effect should be given to an order granting partial summary judgment. We noted that the order was nonfinal and thus could be revised by the district court, but we premised our decision refusing to grant preclusive effect to the partial summary judgment order on the basis that it was unappealable. Avondale, 786 F.2d at 1270. We noted that we were unaware of "any federal appellate decision which had applied preclusion to a prior nonfinal ruling as to which appellate review was unavailable . . . ." Id. & 1271 n.8 (citing Restatement (Second) of Judgments Section 28, comment a). Other circuits have also stressed the importance of appellate review. See e.g., Lombardi v. City of El Cajon, 117 F.3d 1117, 1122 (9th Cir. 1997) (quoting Restatement (Second) of Judgments Section 28(1)); Johnson v. Watkins, 101 F.3d 792, 795 (2d Cir. 1996); J. R. Clearwater, Inc. v. Ashland Chemical Co., 93 F.3d 176, 179 (5th Cir. 1996); In re DES Litig., 7 F.3d 20, 24 (2d Cir. 1993); Alliance to End Repression v. City of Chicago, 820 F.2d 873, 875 (7th Cir. 1987); Edwards v. Boeing Vertol Co., 750 F.2d 13, 15 (3d Cir. 1984); see Standefer v. United States, 447 U.S.

10, 23 and n.18, 100 S.Ct. 1999, 2007 & n.18 (1980) (noting confidence that initial litigation was substantially correct is often unwarranted in absence of appellate review).

In the light of the reasoning set out above, it would seem appropriate to hold as a matter of law that collateral estoppel may not be applied offensively to a jurisdictional decision – such as one granting a motion to remand – that is not capable of being subjected to appellate review.[10] Not only would such a legal rule comport with the reasoning of

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[10] Commentators and case law alike have noted that, while dismissal for lack of jurisdiction does not operate as an adjudication on the merits (see Fed.R.Civ.P. 41(b)), the "judgment is effective to preclude relitigation of the precise issue of jurisdiction . . . that led to the initial dismissal." Hopwood v. Texas, 78 F.3d 932, 961 (5th Cir. 1996) (quoting Wright, Miller & Cooper, Federal Practice & Procedure Section 4436, at 338); Deckert v. Wachovia Student Financial Servs., 963 F.2d 816, 819 (5th Cir. 1992); Equitable Trust Co. v. Commodity Futures Trading Comm'n, 669 F.2d 269, 272 (5th Cir. 1982); Acree v. Air Line Pilots Ass'n, 390 F.2d 199, 203 (5th Cir. 1968). These cases and commentators, however, were not addressing the situation presented by offensive application of collateral estoppel effect to a remand order – a jurisdictional decision subject to no review. As such, they are not dispositive of the issue before us.

most of our estoppel cases, but it would also comply with the Restatement's admonition that "it is in the interest of predictability and simplicity for the result of nonpreclusion to be uniform." Restatement (Second) of Judgments Section 27, comment i. The restraining hand of precedent, however, arguably limits our ruling in this case today.[11] We

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[11] The Supreme Court decided in 1894 that unavailability of appellate review alone could not preclude the application of the doctrine of res judicata. Johnson Steel Street Rail Co. v. Wharton, Jr. & Co., 152 U.S. 252, 261 (1894). The Court held that the "'existence or nonexistence of a right, in either party, to have the judgment in the prior suit re-examined, upon appeal or writ of error, cannot in any case, control[the inquiry into the application of the doctrine or res judicata]." Id. See also Napper v. Anderson, Henley, Shields, Bradford & Pritchard, 500 F.2d 634, 635-37 (5th Cir. 1974) (discussing estoppel by judgment and noting that "[a]s between the two federal district courts, the inability to appeal from the order of remand does not permit the issue actually litigated and determined in the federal court in Arkansas to be relitigated in the second action"); Frith v. Blazon-Flexible Flyer, Inc., 512 F.2d 899, 901 (5th Cir. 1975); cf. Standefer v. United States, 447 U.S. 10, 23 & n.18 (1980) (noting that the lack of appellate review "strongly militates against giving an acquittal preclusive effect," but also noting that Court was not suggesting "that the availability of appellate review is always an essential predicate of estoppel").

We note, however, that the Johnson Steel case, issued in 1894, was a "true" res judicata decision, rendered before nonmutual collateral estoppel was even recognized. Napper and Frith are also pre-Parklane and involved mutual – not nonmutual offensive – estoppel decisions. Furthermore, as noted *supra* note 9, the rules applicable to offensive collateral estoppel generally are more restrictive.

thus turn to decide simply whether the district court abused its discretion when it declined to estop the defendants from relitigating the issue of federal jurisdiction pursuant to the Federal Officer Removal Statute. Copeland, 47 F.3d at 1423.

As we have iterated, the issue decided by the court in Ryan – that the court lacked subject matter jurisdiction under the Federal Officer Removal Statute – was never reviewed by the Second Circuit. Because it was a remand order under 28 U.S.C. Section 1447(d), the court of appeals held itself without jurisdiction to review the decision. It is thus clear that the defendants in Ryan did not contribute to the decision's lack of reviewability. Indeed, they actively sought review. Furthermore, the court in Ryan specifically noted the "closeness of the case" and actually certified the issue for immediate appeal pursuant to 28 U.S.C. Section 1292(b). 781 F.Supp. at 952-53.

We cannot say, then, that binding a defendant to a ruling that it could not appeal as a matter of law would be any fairer than binding a defendant to a decision affirmed on grounds unrelated to the preclusive issue or to a decision left unappealed because the determination was based on alternative grounds. See Restatement (Second) of Judgments Section 27 and 28 and relevant comments; 18 Wright, Miller & Cooper, Federal Practice and Procedure Section 4421 (1981 & 1998) (noting as correct outcome in case where preclusion was denied because there was a lack of

opportunity to appeal). Considerations of fairness then, as set out in Parklane, dictate that collateral estoppel should not be applied to the Ryan Court's decision. We therefore cannot say that the district court abused its discretion in refusing to offensively apply collateral estoppel to the issue of subject matter jurisdiction under Sect. 1442.

IV

Winters next argues that the district court erred when it applied the Federal Officer Removal Statute, 28 U.S.C. Sect. 1442(a)(1), to deny her motion to remand this action to state court. The Federal Officer Removal Statute provides in relevant part:

> (a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

28 U.S.C. Sect. 1442(a) (1).[12] The district court determined that the defendants (1) were "persons," (2) "acting under color of federal authority" when committing the acts that allegedly led to Winters' injuries, and (3) had asserted a colorable federal defense. Winters, 901 F.Supp. at 1198-1203. Winters challenges the district court's conclusions as to all three prongs.

A

(1)

We initially note that when faced with a motion to remand, it is the defendant's burden to establish the existence of federal jurisdiction over the controversy. Vasquez v. Alto Bonito Gravel Plant Corp., 56 F.3d 689, 692 (5th Cir. 1995); Dodson v. Spiliada Maritime Corp., 951 F.2d 40, 42 (5th Cir. 1992); Kidd v. Southwest Airlines Co., 891 F.2d 540, 543 (5th Cir. 1990). The district court determined that the defendants met their burden

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[12] This section was amended in 1996 to read:

(a) A civil action or criminal prosecution commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

28 U.S.C. Sect. 1442(a) (1) (West Supp. 1998) (as amended 1996). The 1996 amendment overruled the Supreme Court's ruling in 1991 that a federal officer, but not a federal agency, could effect removal pursuant to the statute. See International Primate Protection League v. Administrators of Tulane Educ. Fund, 500 U.S. 72, 111 S.Ct. 1700 (1991).

in this case and we review that decision de novo. Sherrod v. American Airlines, Inc., 132 F.3d 1112, 1117 (5th Cir. 1998); Vasquez, 56 F.3d at 692. This standard of review applies even where the district court makes certain findings of fact in denying the motion to remand. Vasquez, 56 F.3d at 692.

(2)

The Supreme Court has on numerous occasions explained the purposes behind Sect. 1442(a) (1). See Willingham v. Morgan, 395 U.S. 402, 405-07 (1969), for the historical background of the Federal Officer Removal Statute. It consistently has been iterated as a principle of federalism and supremacy that the federal government

> can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court, for an alleged offense against the law of the State, yet warranted by the Federal authority they possess, and if the general government is powerless to interfere at once for their protection, -- if their protection must be left to the action of the State court, -- the operations of the general government may at any time be arrested at the will of one of its members.

Willingham, 395 U.S. at 406 (quoting Tennessee v. Davis, 100 U.S. 257, 263 (1880)); see also Mesa v. California, 489 U.S. 121, 126 (1989) (quoting Davis); Arizona v. Manypenny, 451 U.S. 232, 241 n.16 (1981) (same).

In the light of that established precept, the Supreme Court has noted that one of the most important functions of this right of removal is to

allow a federal court to determine the validity of an asserted official immunity defense. Willingham, 395 U.S. at 407; see also Manypenny, 451 U.S. at 242 (noting right of removal is "absolute for conduct performed under color of federal office"); State of La. V. Sparks, 978 F.2d 226, 232 (5th Cir. 1992) (noting chief purpose is to "prevent federal officers who simply comply with a federal duty from being punished by a state court for doing so"). Removal pursuant to Sect. 1442(a)(1) is thus meant to "ensure a federal forum in any case where a federal official is entitled to raise a defense arising out of his official duties." Manypenny, 451 U.S. at 241; Murray v. Murray, 621 F.2d 103, 106 (5th Cir. 1980) (noting removal statute is "incident of federal supremacy"). Furthermore, this right is not to be frustrated by a grudgingly narrow interpretation of the removal statute. Willingham, 395 U.S. at 407; Manypenny, 451 U.S. at 242 (quoting Willingham); Sparks, 978 F.2d at 232 (noting Supreme Court requirement of liberal interpretation for over two decades).

B

(1)

With this mural of broad brush strokes behind us, we turn to the removal issue presented in this case. The defendants must first demonstrate that they are "persons" within the meaning of the statute. We have previously held that corporate entities qualify as "persons" under Sect. 1442(a)(1). International Primate Protection League, No. 93-3067, at

2 (5th Cir. May 4, 1994) (unpublished opinion).[13] Winters thus cannot seriously contest the district court's determination of this initial prerequisite in the defendants' favor. The district court did not err when it held that the defendants met the removal statute's first criteria.

(2)

The second factor necessary for Sect. 1442 removal is a finding that the defendants acted pursuant to a federal officer's directions and that a causal nexus exists between the defendants' actions under color of federal office and the plaintiff's claims. Willingham, 395 U.S. at 409 (citing Maryland v. Soper (No. 1), 270 U.S. 9, 33 (1926)). We have previously noted the Supreme Court's admonishment that the statute's "color of federal office" requirement is neither "limited" nor "narrow," but should be afforded a broad reading so as not to frustrate the statute's

[13] Unpublished opinions issued before January 1, 1996, are precedent. 5th Cir.L.R. 7.5.3.

underlying rationale. Murray, 621 F.2d at 107. On the other hand, the Court has clarified that the right to removal is not unbounded, and only arises when "a federal interest in the matter" exists. Willingham, 395 U.S. at 406; Mesa, 409 U.S. at 139. The question we must determine is whether the government specified the composition of Agent Orange so as to supply the causal nexus between the federal officer's directions and the plaintiff's claims.

The district court determined that the Defense Department had contracted with the chemical companies, for a specific mixture of herbicides, which eventually became known as Agent Orange. Winters, 901 F.Supp. at 1199-1201 (citing In re Agent Orange Prod. Liab. Litig., 996 F.2d 1425, 1436 (2d Cir. 1993)). The court further found that the defendants were compelled to deliver Agent Orange to the government under threat of criminal sanctions. Id. at 1199. Because of the direct control that the court found the government exercised over the composition and production of Agent Orange, the court found a concomitant "substantial federal interest" at stake in the matter. Id. at 1200-01 (also noting federal interest in procurement costs).

> The welfare of military suppliers is a federal concern that impacts the ability of the federal government to order and obtain military equipment at a reasonable cost. Federal interests are especially implicated where, as in this case, the Defense Department expressly issued detailed and direct orders to the defendants to supply a certain product. The specificity of the order raises this issue to a federal concern subject to removal under section 1442 (a)(1).

Id.

Winters contends, however – citing Judge Weinstein's opinion in Ryan for support – that the defendants failed to demonstrate that the government exercised the kind of detailed control over the production and formulation of Agent Orange necessary under Sect. 1442(a)(1) to withstand a motion to remand. In essence, Winters argues that the government provided little direction to the defendants because the government bought Agent Orange as an "off-the-shelf" product. She further contends that no substantial causal nexus exists between the defendants' actions under federal direction – simply providing the government with their product – and her causes of action, i.e., strict liability for a defective and unreasonably dangerous product and failure to provide adequate warnings.

Notwithstanding Winters' arguments, our review of the record convinces us that the district court committed no error when it held that the defendants had satisfied the second criteria for removal pursuant to Sect. 1442(a)(1). The evidence indicates that the government maintained strict control over the development and subsequent production of Agent Orange.

For instance, management for defendant Hercules, Inc. offered the following uncontradicted testimony:

> . . . Hercules had manufactured for domestic sale, among other products the n-butyl esters of 2,4-Dichlorophenoxyacetic acid ("2,4-D") and 2,4,5-Trichlorophenoxyacetic acid ("2,4,5-T"), the two component ingredients of "Agent Orange", since approximately 1962. Both the n-butyl esters and other esters and salts of 2,4-D and 2,4,5-T (generally hereinafter referred to as "phenoxy herbicides") had been sold commercially in the United States, separately and in various combinations, as herbicides for many years before Hercules entered into production. *However, Hercules never manufactured or registered "Agent Orange" for domestic use either prior to or after making "Agent Orange" for the Government.*
>
> * * *
>
> The Government required that "Agent Orange" be produced to its specifications set forth in the contracts and documents referenced therein. For example, the first contract specified that "Agent Orange" consist of a 50-50% mixture by volume of the n-butyl esters of 2,4-D and 2,4,5-T with a tolerance under the contract for each ingredient of +/- 1.5%. The 2,4-D was required to have an acid purity of a minimum of 98.0% by weight and to contain not more than 0.5% of "free acid" by weight, and the 2,4,5-T was required to have an acid purity of a minimum of 99.0% by weight . . . other specifications concerned the packaging, labeling and shipping of "Agent Orange."
>
> * * *
>
> The Government also inspected the labeling of the drums in which "Agent Orange" was shipped. Nothing but what the Government specified was allowed to be placed on the drums. . . . No warning was placed on the containers, and none was permitted by the contract specifications.

Record Volume 1 at 121-123 (March 1980 Aff. Of John P. Frawley).

The evidence is substantially similar with respect to the other defendants as well. Each was required to produce and provide to the Department of Defense the herbicidal mixture known as "Agent Orange" – with the specifications for the defoliant (and its packaging) specifically dictated by the government. Although the defendants had produced 2,4-D and 2,4,5-T for commercial use before government involvement, their commercial formulations were never composed of a mixture of 100% pure 2,4-D/2,4,5-T, which the government required for the most part (98% for 2,4-D and 99% for 2,4,5-T) in its contracts with the defendants. Instead, the defendants had always included a substantial percentage of inert ingredients to dilute the two active ingredients and required further dilution before commercial application. In contrast, the government's specifications for Agent Orange included use of the two active chemicals in unprecedented quantities for the specific purpose of stripping certain areas of Vietnam of their vegetation. To quickly achieve this goal, the government dictated that Agent Orange contain only the active ingredients 2,4-D and 2,4,5-T and it applied the product in Vietnam without dilution.

The gist of this action centers around the trace elements of dioxin contained in Agent Orange and whether a causal relationship exists between Winters' terminal disease and her alleged exposure to that dioxin. We are convinced that the government's detailed specifications concerning the make-up, packaging, and delivery of Agent Orange, the compulsion to

provide the product to the government's specifications, and the on-going supervision the government exercised over the formulation, packaging, and delivery of Agent Orange is all quite sufficient to demonstrate that the defendants acted pursuant to federal direction and that a direct causal nexus exists between the defendants' actions taken under color of federal office and Winters' claims. The defendants have demonstrated the second criteria necessary for federal officers removal.

(3)

The third and final factor necessary for removal pursuant to Sect. 1442 is the assertion of a "colorable federal defense." Willingham, 395 U.S. at 406-07; Manypenny, 451 U.S. at 241 ("[R]emoval under Sect. 1442(a)(1) and its predecessor statutes was meant to ensure a federal forum in any case where a federal official is entitled to raise a defense *arising out of his official duties.*"); Mesa, 489 U.S. at 129, 133-34 ("[A]n unbroken line of this Court's decisions extending back nearly a century and a quarter have understood all the various incarnations of the federal officer removal statute to require the averment of a federal defense."). It is important to note that the defendants need not prove the asserted defense, but need only articulate its "colorable" applicability to the plaintiff's claims. "One of the primary purposes of the removal statute – as its history clearly demonstrates – was to have such defenses litigated in the federal courts. . . . In fact, one of the most important reasons for removal is to have the

validity of the defense of official immunity tried in a federal court. *This officer need not win his case before he can have it removed."* Willingham, 395 U.S. at 407 (emphasis added). In this case, the defendants have proposed two defenses that they contend meet the removal statute's requirement: (1) the government contract defense, and (2) the immunity afforded them under the Defense Production Act.

(a)

The Supreme Court set out the test for immunity under the government contractor defense in Boyle v. United Techs. Corp., 487 U.S. 500, 512 (1988). The Court wrote that

> [l]iability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.

Id. The Court explained that the government's immunity inured to the benefit of the contractor because it was derivative of the government's own immunity from suit "where the performance of a discretionary function is at issue." In re Air Disaster at Ramstein Air Base, Germany, 81 F.3d 570, 574 (5th Cir. 1996) (citing Boyle, 487 U.S. at 511). The Court further noted that "the selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function." Boyle, 487 U.S. at 511. Thus, the decisions regarding the specific

formulation, packaging, delivery, and use of Agent Orange in Vietnam constitute governmental exercise of a discretionary function.

We need not again delve into the specifics contained in the record, as we have done supra, to determine whether the defendants' proffer of the government contractor defense satisfies the third requirement for removal under Sect. 1442; we simply note that the evidence we have earlier described amply supports the defendants' assertion that the specifications for Agent Orange were provided by the government and that the product conformed to those specifications. See Smith v. Xerox Corp., 866 F.2d 135, 138 (5th Cir. 1989) (noting "government contractor defense requires only that the government approve reasonably precise specifications" and that this factor was met where government supplied the relevant specifications). Furthermore, the Defense Department periodically subjected the defendants to supervisory reviews to determine their compliance with the contractual provisions – ascertaining not only their compliance with the contractual requirements for the herbicidal mixture itself, but also with how it was packaged and transported.[14] The government did not "merely accept [], without any substantive review or evaluation, decisions" made by the defendants. Trevino v. General Dynamics Corp., 865 F.2d 1474, 1480 (5th Cir. 1989) (noting the "trier of

[14] For instance, one government inspector even demanded that he be allowed to count the barrels of Agent Orange loaded on a train and to survey their arrangement for traveling purposes.

fact will determine whether the government has exercised or delegated to the contractor discretion over the product design"). Finally, the evidence indicates that the defendants provided the Defense Department with ample warnings concerning the risks of the component parts of Agent Orange, but were specifically prohibited from placing any warnings on the finished product itself except as allowed by contract. Without deciding the merits of the government contractor defense in this case, we certainly deem its assertion sufficiently colorable for Sect. 1442 removal purposes.

(b)

Because we determine that the first proffered defense – the government contractor defense – satisfies the third prong under Sect. 1442 and thus suffices to establish federal court jurisdiction, we need not also address in depth the "colorability" of the defendants' assertion of the Defense Production Act[15] as a defense to Winters' claims. We simply note our agreement in this respect with Judge Weinstein, the "most knowledgeable and informed judge ever with respect to the Agent Orange cases" – according to Winters – who determined that the defendants'

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[15] 50 U.S.C. App. Sect. 2061 et seq. (1988). In relevant part, the Defense Production Act provides:

> No person shall be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with a rule, regulation, or order issued pursuant to this Act.

Id. Sect. 2157.

assertion of the Defense Production Act as a defense satisfied the removal statute. Ryan, 781 F.Supp. at 945.[16]

For the reasons set out supra, we hold that the district court did not err when it denied Winters' motion to remand. The defendants demonstrated their right to a federal forum pursuant to Sect. 1442(a)(1).

V

Having decided that the district court correctly determined its jurisdiction over this matter, we turn to the parties' arguments with respect to the district court's entry of summary judgment. Winters initially contends that the court procedurally erred when it ruled on the defendants'

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[16] Our difference with Judge Weinstein is, for the most part, set out supra in Part IV(B)(2). Judge Weinstein determined that remand was proper because he found that the defendants had failed to satisfy the second prong of the Federal Officer Removal Statute – that they acted under color of federal office. Ryan, 781 F.Supp. at 950. Judge Weinstein, although acknowledging that the case presented a close question, held that the defendants had not demonstrated sufficient government control over the production of Agent Orange because "[t]he government sought only to buy ready-to-order herbicides." Id. He found it determinative that the defendants had formulated, produced and commercially sold all of the component parts of Agent Orange, albeit in different compositions, before government involvement. Id. Our reading of the record, however, reflects that the alleged deadly properties of Agent Orange resulted from that particular mixture of the component chemicals that the government dictated.

motion for summary judgment without allowing her an adequate opportunity to respond. She also argues that there are fact questions as to when her cause of action accrued and that holding that the statute of limitations had expired was error.

A

We first address the alleged procedural error. The defendants filed their motion for summary judgment on May 28, 1996. That same day, the court entered an order granting Winters until June 7 to furnish it with a letter setting out what discovery she would need to complete before she could respond to the defendants' motion. The court also noted that the "[t]ime to respond to [the] motions for summary judgment is hereby extended until the court's ruling on discovery." Winters complied with the order and supplied the court with a letter requesting six months' time in which to engage in discovery and to respond to the summary judgment motion. Most importantly, however, Winters said that she could respond to the statute of limitations issue within 90 days and she set forth no specific discovery that she needed to conduct with respect to that matter. On September 25, without ruling on Winters' discovery requests and without providing her with notices, the district court granted the defendants' motion for summary judgment on statute of limitations grounds.

The district court's failure to set a reply date to the defendants' pending motion for summary judgment effectively denied Winters an opportunity to respond before the court's ruling. We previously have held that ruling on a motion for summary judgment without providing either notice or a hearing "cut[s] off [a] plaintiff's opportunity to develop a record on which the court could fairly rule on the merits of his complaint" and, thus, constitutes error. Kobort v. Hampton, 538 F.2d 90, 91 (5th Cir. 1976); see also NL Indus., Inc. v. GHR Energy Corp., 940 F.2d 957, 965 (5th Cir. 1991) ("Any reasonable doubts about whether [the non-moving party] received notice that its entire case was at risk must be resolved in favor of [that party]."); Capital Films Corp. v. Charles Fries Prod., 628 F.2d 387, 391-92 (5th Cir. 1980) (holding court abuses discretion when it prematurely rules on a summary judgment motion after inducing a party reasonably to believe that he had additional time in which to respond).

The court's entry of judgment in the defendants' favor without providing the non-movant with advance notice of its intention to address the dispositive motion, however, does not require reversal in this case. After receiving the court's order, Winters timely filed a motion for new trial or rehearing. She also submitted evidence in support of that motion and the court considered all of her attachments before denying her motion. Because she was afforded an opportunity, albeit after the initial ruling, to present the court with evidence supporting her arguments, the court's error

in ruling without providing her an opportunity to respond, may be considered harmless. Resolution Trust v. Sharif-Munir-Davidson Dev. Corp., 992 F.2d 1398, 1403 (5th Cir. 1993). Because the district court thus rectified its initial procedural error, we may now reach the merits of its decision.

B

The defendants moved for summary judgment on the basis, inter alia, that Winters' claims[17] were barred by the statute of limitations. The district court determined that, under Texas law, Winters' claims accrued by 1986 at the latest. Because she did not file this lawsuit until 1993, the court held that the two-year statute of limitations had long since run. We review an award of summary judgment de novo, using the same standards as applied by a district court. Bailey v. McDonnell Douglas Corp., 989 F.2d 794, 799 (5th Cir. 1993).

The parties do not contest the application of Texas substantive law to this matter. In Texas, a two-year statute of limitations governs personal injury actions. Tex. (Civ.Prac.&Rem.) Code Ann. Sect. 16.003(a) (Vernon 1986). Claims not brought within two years from the date the cause of action accrues are barred. Id.; Schaefer v. Gulf Coast Regional Blood Ctr., 10 F.3d 327, 331 (5th Cir. 1994). A cause of action accrues when the legal

[17] Winters brought negligence claims, product liability claims, and a breach of implied warranty claim. She has not appealed the district court's resolution of her breach of implied warranty claim.

wrong is completed and the plaintiff becomes entitled to commence her suit, even if she remains unaware of the injury. Vaught v. Showa Denko K.K., 107 F.3d 1137, 1140 (5th Cir. 1997).

Texas courts, however, have adopted a "discovery rule" that lengthens the time within which a plaintiff may institute suit. Id. (citing Moreno v. Sterling Drug, Inc., 787 S.W. 2d 348, 351 (Tex. 1990)). Under the discovery rule, the cause of action may accrue for purposes of ripeness when the legal wrong is consummated, but the statute of limitations is tolled until the plaintiff discovers, or through the exercise of reasonable care and diligence should have discovered, the nature of her injury. Swift v. State Farm Life Ins. Co., 129 F.3d 792, 796-97 (5th Cir. 1997); Vaught, 107 F.3d at 1140 (citing Moreno; Willis v. Maverick, 760 S.W.2d 642, 644 (Tex. 1988)); Schaefer, 10 F.3d at 331. "Discovery" does not mean "actual knowledge of the particulars of a cause of action," but whether the plaintiff has "knowledge of facts which would cause a reasonable person to diligently make inquiry to determine his or her legal rights." Vaught, 107 F.3d at 1140, 1141-42. Under this interpretation, the tolling period may expire and the statute of limitations begin to run before a plaintiff subjectively learns the "details of the evidence by which to establish [her] cause of action." Id. at 1140.

Winters has alleged that she was exposed to Agent Orange while in Vietnam and that the herbicide caused the NHL with which she positively was diagnosed in August 1983. Although her cause of action may have accrued no later than October 1967 – when she left Vietnam – she maintains that she did not "discover" the facts necessary to inform her of her legal rights against the defendants until she read a newspaper article in 1991 that reported a link between Agent Orange and NHL.[18] The defendants contend that she should have discovered her cause of action at least by 1986.

The record is replete with numerous newspaper articles and excerpts from television and radio reports dating from 1984 – and, indeed, before – that concern Agent Orange and its alleged deleterious effects on veterans who were exposed to it in Vietnam.[19] An overwhelming number of the media publications reported on the veterans' suits brought against

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[18] The newspaper article was in the Chicago Sun-Times. It reported that President Bush had signed into law legislation awarding compensation to veterans suffering from NHL who had been exposed to Agent Orange.

[19] See. e.g., "Agent Orange trial jury review begins," Chicago Tribune, May 1, 1984; "7 Agent Orange makers on trial," Chicago Sun-Times, May 7, 1984; Anne Keegan, "Vietnam vets feel robbed of day in court," Chicago Tribune, May 7, 1984, at 1; "Vets pleased with decision," Chicago Calumet, May 8, 1984; Hugh Hough, "Settlement is a 'slap in the face,' Viet vet says," Chicago Sun-Times, May 8, 1984; "Agent Orange makers to pay $180 million," Chicago Sun-Times, May 8, 1994; Bob Olmstead, "Agent Orange accord hit," Chicago Sun-Times, May 11, 1984; Joseph R. Tybor, "Vets accuse lawyers of selling out," Chicago Tribune, May 25, 1984; "This Morning" (ABC television broadcast, May 7, 1984) (news bit concerning Agent Orange); "4:30 Chicago News" (WMAQ-TV (NBC) Channel Five local news) (news bit about settlement and interviews with local vets). Winters resided in Chicago during the 80s.

the chemical companies and on the $180 million out-of-court settlement reached on May 7, 1984. Almost all of the reports in the mid-80s mention that Agent Orange is alleged to have caused various illnesses, including cancer.

Still another major story that garnered a blitz of media coverage concerned Admiral Elmo Zumwalt's admission that a connection probably existed between Agent Orange and his son's cancer.[20] Admiral Zumwalt had ordered the use of the chemical defoliant in Vietnam while his son served there on a Navy patrol boat. Zumwalt's son discovered in 1983 that he suffered from advanced cancer of the lymph glands; Zumwalt's grandson also was afflicted by a birth defect. Because the story dripped with irony, the media widely reported on both illnesses in the context of their alleged causal relationship with Agent Orange.

Winters testified that she first thought that she might have been exposed to Agent Orange while she had been working as a nurse in Saigon when she read newspaper reports in the 80s of the defoliant's use in Vietnam. She also testified that she may have seen on the news during that same time the publicity about veterans who were suing for cancer that was allegedly caused by Agent Orange. She said, however, that she did not

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[20] See, e.g., "Zumwalt haunted by Agent Orange," Chicago Tribune, May 22, 1984; Georgie Anne Geyer, "World's complexity makes U.S. uneasy," Chicago Sun-Times, May 31, 1984.

"follow" the reports about the claims and that she never read of any reported link between Agent Orange and NHL until the 1991 article.

Winters testified, however, that she made no effort to gather information as to what may have caused the NHL after her diagnosis in 1983. In fact, she never inquired of the cause of her illness until after she read the 1991 article. The extensive media publicity of the mid-80s, however, should have put Winters on notice that she needed to investigate any possible connection between her cancer – NHL – and her alleged exposure to Agent Orange while in Vietnam. Although she testified that she focused only on the reports of the chemical spraying and not the claims associated with its spraying, she conceded that most reports were made in the conjunctive – discussing the spraying only as it was relevant to the claims. Because most of the media reports also discussed claims that the herbicide caused cancer, among various other illnesses, Winters surely had sufficient knowledge in the mid-80s "of such facts as would cause a reasonably prudent person to make an inquiry that would lead to discovery of the cause of action." Vaught, 107 F.3d at 1140 (quoting Hoover v. Gregory, 835 S.W.2d 668, 671 (Tex.Ct.App. 1992)).

But Winters argues that she could not reasonably have discovered her cause of action before 1991 because "not a single doctor who treated her or dealt with her NHL, ever told her that there might be even the possibility of a connection between Agent Orange exposure and NHL."

Texas does not allow, however, for the tolling of the limitations period until "a plaintiff discovers a specific cause of action against a specific defendant." Id. at 1142 (citing Moreno, 760 S.W.2d at 357 n.9). The question presented is not "whether a plaintiff has actual knowledge of the particulars of a cause of action . . .; rather, it is whether the plaintiff has knowledge of facts which would cause a reasonable person to diligently make inquiry to determine his or her legal rights." Id. at 1141-42 (quoting Bell v. Showa Denko K.K., 899 S.W.2d 749, 754 (Tex.Ct.App. 1995)). The media's coverage of the Agent Orange matter in the 80s placed within Winters' grasp such triggering facts. "The discovery rule operates to trigger the statute of limitations once a plaintiff has the requisite knowledge, *regardless of whether or how the plaintiff is advised by the medical community.*" Vaught, 107 F.3d at 1142 (emphasis added) (also noting that a plaintiff "who may be incorrectly advised, may be precluded from pursuing her cause of action, even though she took the necessary investigatory steps mandated by the discovery rule"). Thus, under the "discovery rule," the two-year statute of limitations was triggered some time in the mid-80s and Winters' suit, filed in 1993, is barred.

VI

In conclusion, we hold that the district court did not abuse its discretion when it declined to afford Judge Weinstein's remand decision in Ryan offensive collateral estoppel effect so as to bar the defendants' relitigation of the applicability of the Federal Officer Removal Statute. We further hold that the Federal Officer Removal Statute provides federal jurisdiction over this action and that the plaintiff's claims are barred by the Texas statute of limitations. For the foregoing reasons, we AFFIRM the judgment entered by the district court.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

JOHN WINTERS, SR., INDIVIDUALLY AND AS THE REPRESENTATIVE OF THE ESTATE OF MARGARET WINTERS, DECEASED; FR. MARTIN WINTERS, Plaintiffs,	§	
vs.	§	NO. 1:93-CV-164
DIAMOND SHAMROCK CHEMICAL COMPANY A/K/A DIAMOND SHAMROCK REFINING & MARKETING COMPANY, A/K/A OCCIDENTAL ELECTRO CHEMICAL COMPANY, A/K/A DIAMOND SHAMROCK COMPANY, A/K/A OCCIDENTAL CHEMICAL CORP., A/K/A MAXUS ENERGY CORP.; THE DOW CHEMICAL COMPANY; MONSANTO COMPANY; UNIROYAL, INC.; HERCULES, INC.; THOMPSON-HAYWARD CHEMICAL COMPANY, A/K/A THOMPSON CHEMICAL CORPORATION; AND T.H. AGRICULTURE & NUTRITION COMPANY, INC., Defendants.	§	

MOTION FOR NEW TRIAL PURSUANT TO RULE 59, F.R.C.P. AND/OR REHEARING PURSUANT TO RULE 60, F.R.C.P.

1. The Court Erred In Disregarding Critical Parts of Ms. Winters' Deposition Which Testimony Clearly Establishes The Existence Of At Least An Issue Of Fact As To Whether Ms. Winters Knew or Should Have Known That Agent Orange Cause Her Non-Hodgkin's Lymphoma ("NHL") More Than Two Years Prior To Filing Suit. Had the Court permitted the reply it indicated it would permit, it would have been privy to some additional deposition testimony of Ms. Winters attached hereto as Exhibit 1 and incorporated herein by reference (testimony in addition to that proffered by the Defendants). Exhibit "1" includes pp. 244-257 of said deposition. There, Ms. Winters expressly testifies that she did not "hear about spraying of Agent Orange when (she) was in Vietnam in 1966 and '67", p. 244; that although she heard of Agent Orange being used in Vietnam in the 1980's, she did not "focus in on any of the supposed health effects" and "didn't follow it that closely", one of the reasons being that, during the 1980's, she was beginning to have serious health problems of her own, and because of that, there was a "lot of things I didn't pay attention to", p. 245; then she testified as follows:

Q: "Okay. When is the first time – now, this is a very important question. Think about it before you answer, because you're answering under oath.
A: Yes.
Q: When is the first time – tell the jury when is the first time that you ever heard non-Hodgkin's disease lymphoma mentioned in connection with or in association with exposure to Agent Orange? When?
A: To that particular ilness?
Q: Yes.

A: The first time that I knew there was any connection –

Q: No, that you heard that there might be a connection.

A: Yeah, not knew because I wasn't positive. That I heard or read about it was in a newspaper article that I read.

Q: And which article are (you) referring to and what paper?

A: It was in the Chicago Sun Times, and it was on the front page. It was right at the bottom that the government – I believe the president or – had signed legislation that would compensate veterans who had suffered – who had been exposed to Agent Orange and had non-Hodgkin's lymphoma.

Q: Do you remember any other disease that was mentioned along with non-Hodgkins lymphoma?

A: There were two that I recall.

Q: All right.

A: Non-Hodgkin's lymphoma and soft tissue sarcoma. Those are the two.

Q: And that was the first time you ever heard –

A: That was the first time."

pp. 245-247 of Ms. Winters' depo.

She testified that she read that Sun Times article some time in 1991, dep. pp. 165, 166, or about two years prior to the date of her deposition (her deposition was taken June 1, 1994), dep. pp. 162. After reading the Sun Times article (in which Pres. Bush announced that the Veteran's Administration would pay veterans' claims for NHL if the veteran was exposed to Agent Orange in Vietnam), she testified she did the following:

Q: "...Now, having read that, did you just read it and forget about it, or did you say to yourself maybe I ought to do something about it; find out what I can about it?

A: When I read it, I was – I thought that's me. That's the first thing I thought. I was at work. I had bought the paper on the way to work and I glanced at it...It was on the front page. I didn't have time to read while I was working, but you couldn't miss it. It was right at the bottom.

And I went home, and I said to my sister, 'You know, they're compensating veterans for my illness.' I said, 'You know, maybe my problem is the same problem.'

So my nephew being a lawyer, I thought I'm going to ask him if there's – if he thinks there's any –

Q: Your nephew now is John?

A: My nephew is John Winters.

Q: John Winters.

A: So I said I'm going to ask him if he thinks there's any connection between my illness and that

Q: And he is a lawyer?

A: He is a lawyer.

Q: All right. Did he report back to you that he – did he start making efforts to help find out whether there was any connection?

A: He told me he would investigate it. He said –

Q: All right. Did he ever report back to you what kind of investigation he was doing?

A: He did from time to time.

Q: Tell the jury what he told you he was doing.

A: He was that he had talked to people from Senator Simon's office. He's our Senator from Illinois.

A: And they told him – see, first, veterans – he was – or I don't know if it was – year, I guess it was – he thought that I could – he learned of suits that were going on with veterans.

A: But he said I couldn't be included in that because I wasn't a veteran.

Q: Did he talk to somebody about that? Did he report talking to somebody?

A: He said he talked to somebody in New York, some judge in New York.

Q: Or his clerk? Was it his clerk?

A: It might have been his clerk.

Q: Was the name Judge Weinstein, does that name ring a bell? A clerk for Judge Weinstein?

A: It might be, yes. It sounds familiar.

Q: All right.

A: My understanding was that I couldn't be included in the suit that was either gong on or going to begin or something like.

Q: Then what did he next report to you?

A: Well, then he told me he was given the name – he was told to contact the American Trial Lawyers Association, which was in Washington, D.C.

Q: Okay.

A: And maybe they could help him.

Q: All right.

A: And he said that's how he come to be in touch with yourself, Mr. Musslewhite.

Q: All right...

Q: All right. Let's do it this way. Was it at the end – was it – what period of time, was it in 1993 – I mean, 1992 or 1993 that he said he finally made contact with me, do you know approximately?

A: That was in 1992 sometime.

Q: All right.

A: '92.

Q: What part; first part, latter part, middle part?

A: Not the first. I would think more towards the latter.

Q: Latter part of '92.

A: Yes.

Q: And then the suit was eventaully filed; is that correct?

A: For – after talking to you, he thought that there was cause enough to pursue, yes.

Q: When's the first time that Mr. Winters, after you asked him to investigate, sat down with you and said to you and you together decided you might have a potential cause of action?

A: Not until late '92...

Q: That's after he finished his investigation?

A: Oh, yes.

Q: And that's the first – when you first decided – is that when you first decided you might have a cause of action?

A: Yes.

Q: Late '92?"

pp. 245-247, 252-253 of Ms. Winters' depo.

It is important to note that Ms. Winters – who is not an oncologist, internist or meatologist, indeed who is not even a doctor of any kind – testified expressly that no doctor, not a single doctor who treated her or

dealt with her NHL, ever told her that there might be even the possibility that there was any connection between Agent Orange exposure and NHL. Dep. at 161, 162, 173. The minute she read the Sun Times article, wherein Pres. Bush announced that the V.A. would compensate veterans exposed to Agent Orange in Vietnam for NHL, she asked her lead treating doctor, Dr. Forensi, whether her NHL might have been caused by her exposure to Agent Orange while she was in Vietnam. Dr. Forensi just replied: " I don't know". Dep. at p. 163.

And this is not at all surprising. Most oncologists, hematologists, internists and general practitioners – unless they have had special training in toxicology or have had occasion to search the medical literature – would not be aware that there might be a causal connection between Agent Orange and NHL.

As to the articles that Defendants attached to their Motion for Summary Judgment, we point out that only two mention NHL (the one in 1987 and the one in 1984 about Admiral Zumwalt and his son). Ms. Winters expressly denied ever having seen those articles, dep. at pp. 179-181, 253-255. She testified unequivocally as follows:

> Q: "Now, there was a mention I think yesterday of some articles that were shown to you. Do you remember those? They were attached to – that were going to be attached to your oral deposition yesterday; do you remember those articles that Mr. Krohley showed to you?
>
> A: Oh, yes. Yes, I do.

Q: One article was about – about some of the veterans who had been in this first class action, do you remember that? There were four or five of them?

A: Yes, I recall. I don't remember the names, but I –

Q: And he asked you the question of whether or not you saw that article, and I believe, if I recall, you had not seen that particular – did not recall seeing that article?

A: Exactly.

Q: Asked you if you had seen articles like that, and you said I might have. Do you remember that?

A: Hm, hmm. Yes, I do.

Q: Now, I want to be sure the record's clear on that. Had you – prior to this article you saw sometime in '91 in the Sun Times, was that it?

A: It was in the Sun Times.

Q: Okay. Talking about legislation having been adopted. Saying that veterans could recover compensation if they were exposed to Agent Orange and had non-Hodgkin's disease lymphoma. Prior to the article – I want to make sure we're clear on this – had you ever seen an article wherein the disease of non-Hodgkin's disease lymphoma had been associated with the exposure of Agent Orange prior to that article?

A: Prior to that, no.

Q: Okay. And you're sure about that?

A: I'm positive about that."

pp. 253-255 of Ms. Winters' depo.

Ms. Winters also testified unequivocally that she was never aware of any scientific studies making the connection between Agent Orange and NHL, dep. p. 175; nor of any information from her employer, the Agency for International Development, dep. p. 182; nor did she ever attend any conferences where Agent Orange was discussed, dep. p. 184.

This is another case where the chemical companies hypocritically and loudly proclaim out of one side of their mouth that their Agent Orange did not cause any serious injuries and certainly did not cause NHL but, out

of the other side of their mouth, assert that Ms. Winters should nevertheless have known more than two years in advance of filing suit that Agent Orange did cause NHL. See her discussion of no warnings from the chemical companies, dep. at pp. 255-257.

Indeed, even if Ms. Winters had read the 1984 and 1987 articles mentioning Agent Orange and NHL, and had gone to John Winters (as she says she would have done if she had read the articles, depo. At p. 255), Mr. Winters no doubt would have read the holding of the Second Circuit which came down in 1987 to the effect that Agent Orange does not cause adverse health effects. In Re Agent Orange Product Liability Litigation, 818 F.145 (2d Cir. 1987) cert. den. 484 U.S. 1004 (1988).[2] And with Rule 11, F.R.C.P. staring him in the face, he probably would have advised against any suit at that time. Thus, even if, as this Court suggests, Ms. Winters should have made some inquiry, there is at least a sub-fact issue as to just what that injury would have led to at that time (at the time of the two articles mentioning NHL) – a time when the prevailing judicial decisions seemed to suggest no cause of action.

[2] The Court states that the Congress adopted a bill in 1984 but that bill did not include NHL and it only pertained to veterans, not civilians.

It was not until the Congress finally go involved, held hearings and concluded that there was indeed a causal connection between Agent Orange and NHL and enacted a law presuming such causation with regard to V.A. claims, that there was massive publicity concerning such causation. Indeed, the announcement of this law by Pres. Bush was the very article which Ms. Winters describes as having read in 1991.

And we respectfully, but strongly, disagree with the Court's conclusion that, from the two isolated articles mentioning NHL, Ms. Winters can be conclusively deemed to have had constructive notice of the connection between Agent Orange and NHL. United Klans of America v. McGovern, 621 F.2d 152 (5th Cir. 1980), the only case cited by the Court in support of that proposition, does not support the granting of the drastic remedy of summary judgment on the basis of two isolated articles mentioning NHL, published in a big city such as Chicago where there are several competing newspapers and published at a time when Ms. Winters

was beginning to be preoccupied with serious health problems of her own, particularly in the face of Ms. Winters' firm uncontradicted and unequivocal testimony that she did not see either one of the two articles.[3]

In sum, at the very least a fact issue has been presented as to whether Ms. Winters knew or, in the exercise of ordinary care, should have known, that Agent Orange causes NHL more than two years prior to filing suit in this case. Thus, the Court erred in granting summary judgment on the limitations issue.

4. The Court erred in holding that a cause of action for breach of implied warranty accrues when the alleged breach occurs. The breach of warranty, we respectfully submit, is also submit to the discovery rule, particularly in view of the Texas Open Court's Constitutional provision. See discussion above. In any event, we do not believe Safeway Stores, Inc. v. Certainteed Corp., 710 S.W. 2d 544, 546 (Tex. 1986) mandates that, under the contracts in this case, the discovery rule is not available to the plaintiffs.

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[3] The Court notes that Ms. Winters "read newspaper reports concening alleged health effects from the spraying of Agent Orange at about the same time of her diagnosis". Probably referring to her statements at pp. 179-182 of her depo. However, she never testified that she read anything about claims by the veterans at that time with respect to NHL and, to the extend that the Court migh believe that there could be some contradiction between those statements and the clear and unequivocal testimony on direction examination, the Court must give Ms. Winters the benefit of the doubt in the summary judgment analysis and accept the testimony most favorable to her. Randall v. Dallas Power & Lighting Co., 752 S.W. 2d 4,5 (Tex 1988); Tenowich v. Sterling Plumbing Co., 712 S.W. 2d 188 (Tex. App. – Hou. (14th Dist.) 1986).

Wherefore, PREMISES CONSIDERED, Plaintiffs move the Court to grant a new trial and/or rehearing and, upon New Trial or Rehearing, remand this case to the state court of Texas and deny the Defendants' Summary Judgment Motion based on limitations.

Respectfully submitted,

S/

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was forwarded to all counsel of record by United States Mail, First Class, postage prepaid, or via telecopier on this 7th day of October, 1996.

S/
Benton Musslewhite